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JUN 3 1982
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81 No. 2315

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANGELO DEL RE,

Petitioner,

v.

PRUDENTIAL LINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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* The Appendix to the Petition forms a separate volume, which is being submitted with the Petition.

QUESTIONS PRESENTED FOR REVIEW

1. Where a longshoreman who is injured while at work on board a vessel, due to the negligence of the shipowner, fails to bring an action for damages against the shipowner within the time prescribed by statute for doing so (Section 33(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. section 933(b)(the "Act"*), with the result that all right of the longshoreman to recover damages against the shipowner is automatically assigned to the employer (33 U.S.C., section 933(b)), or to the latter's compensation insurance carrier, by subrogation, if the carrier has paid the compensation benefits (33 U.S.C.,

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*that is, within six (6) months after accepting compensation under an award in a compensation order made by a deputy commissioner of the United States Department of Labor Compensation Board

section 933(h)), but notwithstanding said facts and law the longshoreman, after the expiration of said 6-month period, does bring such an action against the shipowner, may the employer's compensation insurance carrier, who has paid the compensation benefits, effectively ratify the commencement of the action, pursuant to Rule 17(a) of the Federal Rules of Civil Procedure?*

2. Where the carrier referred to in "(1)" above, at the time of ratifying the commencement of the action, also agrees that it will not bring a separate

*If the carrier may effectively ratify the action, pursuant to Rule 17(a), the action will be deemed to have been commenced by the carrier, as the real party in interest, and thereafter prosecuted for its benefit (Rule 17(a)), subject, however, if there is a recovery, to the provisions of 33 U.S.C., section 933(e), governing the distribution of the proceeds of the recovery.

action against the shipowner, but, instead, will be bound by any judgment in the action determining the issues of liability and the amount of damages, if any, as well as by any release executed by the longshoreman with its approval, in which agreement the longshoreman joins, the carrier exacting, in return, with the longshoreman's consent, a lien and "credit rights" (sic) on the proceeds of any recovery by way of judgment or settlement, for the compensation benefits it has paid, are said additional facts essential in order to render the ratification effective?

2a. If the facts recited in "(2)" above are essential in order to render the ratification referred to in "(1)" and "(2)" above effective, do said facts indeed render the ratification effective?

3. Do the ratification and agreement between the carrier and the longshoreman described in "(1)", "(2)" and "(2a)" above, whereby the carrier, inter alia, is given a lien on the proceeds of any recovery, for the amount of compensation benefits it has paid, effect a waiver by them of their right to have the proceeds of any recovery distributed in accordance with the provisions of 33 U.S.C., section 933(e), insofar as said statute relates to their shares?

3a. Do the ratification and agreement referred to in "(1)" - "(3)" inclusive, above, effectively permit the carrier and longshoreman to distribute, in accordance with said agreement, what would otherwise be their shares under 33 U.S.C., section 933(e)?

4. If the carrier referred to in "(1)" through "(3)" above, at the time of ratifying the commencement of the action, which was brought in a federal district court, relies, in ratifying the action, upon a holding by the court of appeals for the circuit in which the action was brought, handed down in a case in which the pertinent material facts are identical to the pertinent material facts in the action brought by the longshoreman, referred to in "(1)" through "(3)" above, the holding being to the effect that had the statutory assignee of the longshoreman's cause of action against the shipowner, brought after the expiration of the 6-month period prescribed for bringing such action, ratified the commencement of the action, pursuant to Rule 17(a), that fact would have effectively conferred standing upon the longshore-

man to main the action*, and that holding was essential to, and an integral part of the decision in that case, does the ratification by the carrier referred to above herein, in reliance upon said holding, effectively confer standing upon the longshoreman to maintain the action?

5. Did the Court of Appeals below in (a) unexpectedly overruling, in this case, albeit sub silentio, its holding in Rodriguez v. Compass Shipping Co., supra, 617 F. 2d 955, 958, described in "(4)" above, and (b) applying the overruling to and in the case at bar retroactively, as it did, deny to the carrier and long-

*Rodriguez v. Compass Shipping Co., supra (2 Cir., March 19, 1980), 617 F. 2d 955, 958 (at "(2)", aff'd. on other grounds, _____ U.S. _____, 101 S. Ct. 1945. The ratification by the carrier in the case at bar, in reliance upon Rodriguez, supra, took place on May 12, 1981, fourteen (14) months after the Rodriguez decision.

shoreman the due process rights - that is, notice of, and opportunity to be heard in opposition to, the retroactive application of the overruling - guaranteed by the Fifth Amendment to the Constitution of the United States?

6. Where the carrier referred to in "(1)" through "(5)" above, at the time of ratifying the commencement of the action, also agrees that if its ratification "is sufficient to preserve to" the longshoreman "ownership of the cause of action", it will not institute a separate action against the shipowner, but, instead, will be bound by any judgment in the action determining the issues of liability and the amount of damages, if any, as well as by any release executed by the longshoreman with its approval,

with the carrier, however, having a lien and credit rights for the compensation benefits it has paid, on the proceeds of any recovery in the action, by way of judgment or settlement, may the carrier, who, as subrogee of the employer, has exclusive control of the action (Rodriguez v. Compass Shipping Co., _____ U.S. _____, 101 S. Ct. 1945, 1955), be properly said not only to have ratified the commencement of the action, but also, at the same time, to have reassigned the cause of action against the shipowner to the longshoreman?

7. Did the Court of Appeals below, in failing to give effect to

(a) the carrier's ratification of the commencement of the longshoreman's action referred to in "(1)" to "(6)", inclusive, above, as well as the

carrier's reassignment to the longshoreman of the cause of action against the shipowner, referred to in "(6)" above, together with the carrier's concomitant agreement that it will not bring a separate action against the shipowner, but, instead, will be bound by any judgment in the action determining the issues of liability and amount of damages, if any, as well as by any release executed by the longshoreman with the carrier's approval, and the carrier's exaction, in return, for said ratification and reassignment, of a lien and "credit rights" (sic), in its favor, on any recovery in the action by way of judgment or settlement, for the compensation benefits it has paid, and

(b) the longshoreman's

agreement and consent to, and acceptance of, all the matters recited in "(a)" directly above,

did the Court of Appeals, in failing to give effect to all the foregoing, deny the carrier and the longshoreman the due process property rights guaranteed by the Fifth Amendment to the Constitution of the United States?

with the carrier's approval, and the carrier's agreement that, as consideration for its ratification and reassignment and concomitant agreement, set forth directly above, it will accept a lien and credit rights for the compensation benefit payments it has paid, which will attach to the proceeds of any recovery in the action by way of judgment or settlement, and (b) to the longshoreman's acceptance of said ratification and reassignment, as well as the carrier's concomitant agreement, set forth above, and its agreement to accept, as consideration, a lien and credit rights on the proceeds of any recovery in the action by way of judgment or settlement, for the compensation benefits it has paid - did the Court of Appeals, in failing to give effect to all the foregoing, deny the carrier and the longshoreman the due process guaranteed by the Fifth Amendment to the Constitution of the United States?

THE PARTIES TO THE PROCEEDINGS IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

The names of the parties in the Court of Appeals for the Second Circuit, whose judgment is sought to be reviewed, are set forth in the caption of the case in this Court.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit which was delivered upon the rendering of the judgment sought to be reviewed is printed at pp. 1a-13a of the Appendix (which forms a separate volume), and is reported at 669 F. 2d 93.

The opinion of the United States District Court for the Southern District of New York which denied, without prejudice to renewal, the motion made by defendant Prudential Lines, Inc. (respondent in this Court) to dismiss the complaint, which opinion is reproduced at pp. 14a-18a of the Appendix, does not appear to have been reported.

The opinion of the United States District Court for the Southern District of New York denying on the merits the renewed

motion by the defendant Prudential Lines, Inc. (respondent in this Court) to dismiss the complaint, which opinion is reproduced at pp. 19a-23a of the Appendix, does not appear to have been reported.

The amended opinion and order (one paper) of the United States District Court for the Southern District of New York, certifying questions to the Court of Appeals, pursuant to 28 U.S.C., section 1292(b), in order to facilitate immediate interlocutory review, which opinion and order are reproduced at pp. 24a-25a of the Appendix, do not appear to have been reported.*

With respect to the compensation order made by a deputy commissioner of the United States Department of Labor Compensation Board, which awarded compensation to petitioner herein, which order is reproduced at pp. 27a-30a of the Appendix, no opinion was issued by the deputy commissioner.

*Neither the District Court, in certifying questions, nor the Court of Appeals, in granting leave to appeal (26a), wrote an opinion.

THE COURT'S JURISDICTION TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS

The judgment of the Court of Appeals for the Second Circuit which is sought to be reviewed (reproduced at pp. 32a-33a of the Appendix) is dated January 21, 1982, and was entered the same day.

No rehearing was sought.

THE DATES AND TERMS OF THE ORDERS IN THIS COURT GRANTING EXTENSIONS OF TIME WITHIN WHICH TO PETITION FOR CERTIORARI

On April 13, 1982 Mr. Justice Marshall, Associate Justice of this Court, signed an order extending the time for filing a petition for a writ of certiorari in this cause until and including May 20, 1982.

On May 17, 1982 Mr. Justice Mar-

shall, Associate Justice of this Court, signed an order extending the time for filing a petition for a writ of certiorari in this cause until and including May 27, 1982.

On May 26, 1982 Mr. Justice Marshall, Associate Justice of this Court, signed an order extending the time for filing a petition for a writ of certiorari in this cause until and including June 3, 1982.

THE STATUTORY PROVISION BELIEVED TO CONFER JURISDICTION ON THIS COURT TO REVIEW THE JUDGMENT IN QUESTION BY WRIT OF CERTIORARI

The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C., section 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the construction of 33 U.S.C., sections 905(b) and 933(b) and (h).* These statutory provisions are set forth in Appendix "A" attached hereto.

THE RULE OF THE FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

This case also involves the construction of Rule 17(a) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The initial proceedings

Petitioner Angelo Del Re was injured on May 7, 1975, while working as a longshoreman for Northeast Stevedores, Inc., on a ship owned by respondent Pru-

*Also, sections 904 and 933(e).

dential Lines, Inc. (27a*-28a, pars. "1"-"2"; 43a, second par., 59a, par. "19"; 64a, par. "9"; 4a, first par.). More particularly, Del Re, because of the ship's defective winches, was crushed by a draft which fell from said winches (43a, second par.).

As a result of the accident Del Re was unable to work for 29 weeks, and suffered permanent injury to his right arm and both of his legs (28a-29a, par. "5"; 4a, first par.).

Northeast's compensation insurance carrier, the State Insurance Fund, paid Del Re interim compensation during the period he was unable to work, and on

*Numbers, followed by the letter "a", unless otherwise indicated, refer to pages of the Appendix which forms a separate volume.

February 25, 1977 the Deputy Commissioner, Second Compensation District, of the United States Department of Labor, approved an award of $13,935.38, and filed an award to that effect incorporated in a compensation order (28a-29a, par. "5"; 4a, first complete par.).* Del Re accepted said award (65a, par. "14").

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*Although the compensation order states that "The employer and the insurance carrier have paid $3,090.00 to the claimant as compensation..." (29a, first complete par.),and directs that "The employer, the Northeast Stevedore, and the insurance carrier, the State Insurance Fund, shall pay to the claimant compensation as follows:", which is then specified, the fact of the matter, however, is that only the carrier paid claimant the said compensation,nor did respondent Prudential Lines in either of the courts below, contend otherwise,nor did either of those courts find otherwise. The reference to both the employer and the carrier in the order is standard language which appears in every compensation order, and reflects the fact that the employer is the one who, in the first instance, is obligated to pay the compensation. 33 U.S.C. section 904. Having paid the compensation benefits, the State Insurance Fund was subrogated to the rights of the employer (5a).

On October 17, 1977*Del Re commenced a personal injury action against Prudential, based on the latter's negligence, in the Supreme Court of the State of New York, County of New York (71a-72a; 43a, third par.; 64a, par. "11"; 16a-17a; 4a, second par.).

Prudential did not respond in any way to the suit, but Del Re did not seek a default judgment (46a, first par.; 16a-17a; 57a-58a, par. "15"; 4a, second par.).

On April 28, 1980, more than six (6) months after Del Re had, on February 25, 1977, accepted compensation under an award in a compensation order made by a deputy commissioner (65a, par. "14"), Del Re commenced an action against Prudential for personal injury damages, on account of the latter's negligence, in the United

*or October 14, 1977

States District Court for the Southern District of New York (34a-38a; 45a, last par.; 64a, par."10", 4a, second par.). The action was brought in the name of Angelo Del Re as plaintiff, seeking damages on his own behalf for injuries sustained in the course of his employment as a stevedore, on May 7, 1975, aboard Prudential's ship, the S.S. Santa Barbara (35a-38a; 4a, second par.).

On June 6, 1980 Prudential filed its answer to the complaint (39a-41a).

In addition to denying the material allegations of the complaint (39a; pars. "1"-"4"), the answer pleaded three complete affirmative defenses (39a-40a, pars. "5"-12"). The first was that the complaint failed to state a cause of action upon which relief could be granted (39a, par."5").

The second was that the action was "time barred pursuant to the doctrine of laches" (40a, pars. "6"-"10").

The third was that plaintiff's injury, if any, was the sole result of his own negligence, or of the negligence of his employer, Northeast Stevedoring Co., in failing to properly supervise Del Re, and that there was no negligence on the part of Prudential (40a, pars. "11"-"12").

After Prudential filed its answer to the complaint, it moved to dismiss the action on the ground of laches and Del Re's failure to bring the suit within six (6) months after his receipt of the award under the Department of Labor order (which was dated February 25, 1977, and filed the same day; 27a-31a), as required by 33(b) of the Longshoremen's Harbor and Workers' Compensation Act, 33 U.S.C., section 933(b)

(15a; 4a, third par., 43a, first par.).*

With respect to the motion in branch to dismiss on the ground of laches, District Court Judge Sand decided that the issue of laches could best be decided after trial, and denied that branch of the motion without prejudice to renewal at the close of the trial (15a-16a; 17a, last par.; 4a, last par.).

With respect to the motion in

*As stated in the Appendix which forms a separate volume (42a, footnote), Prudential's notice of motion and moving papers were not included in the Joint Appendix filed with the Court of Appeals on Prudential's appeal to that Court, which resulted in the judgment sought to be reviewed in this Court. The headings in the Appendix indicating that Del Re's opposing affidavit and Prudential's reply affidavit were filed in connection with a motion made by Prudential to dismiss the complaint "for laches" (only) are incomplete in that they should have added that the motion was also based on Del Re's failure to bring the action within the prescribed 6-month period (33 U.S.C., section 933(b)).

branch to dismiss on the ground of Del Re's failure to bring the suit within the prescribed 6-month period, Judge Sand, in view of Prudential's inability at that time to show when the award in the compensation order was filed or when any settlement (embodied in an order) was agreed to by the parties, denied that branch of the motion without prejudice to renewal (17a, last par., to be read with 4a, last par.).

Finally, Judge Sand ordered Del Re to elect whether he intended to seek a default judgment in the state court action, or to litigate the federal court action (17a, first complete par.; 4a-5a).

Thereafter the state court action was discontinued, but the discontinuance was not "with prejudice" (67, par. "1"; affirmation of Howard Fishker, an attorney associated with the attorneys

for Del Re, dated May 18, 1981, submitted on behalf of Del Re in opposition to Prudential's renewed motion to dismiss the complaint, a motion we deal with subsequently herein; see, also, 4a-5a).

While Prudential, in an affidavit by its attorney, John F. McHugh, submitted in support of Prudential's renewed motion to dismiss the complaint (a motion which, as we have said, we deal with subsequently herein), alleged that the discontinuance of the state court action was "with prejudice", and further stated that a copy of the document evidencing said discontinuance was filed in the state court, and was attached to Mr. McHugh's affidavit as Exhibit "D" (65a, par. "12"), that claim that the discontinuance was "with prejudice" was subsequently abandoned by Prudential, as evidenced by the following facts: Not only was the document allegedly demonstrating

that the discontinuance was "with prejudice" not included in the Joint Appendix filed in the Court of Appeals on Prudential's appeal to that court, which resulted in the judgment sought to be reviewed, but in its principal brief in that court, Prudential's only reference to the discontinuance is devoid of any claim that it was with prejudice, consisting, as that reference does, only of the statement,

> "On March 4, 1981, plaintiff voluntarily discontinued his State Supreme Court action (A-48) and therefore the only pending action is the instant one" (brief, p. 3, third par., concluding sentence).

Moreover, Prudential, in its reply brief in the Court of Appeals, in its "chronology of significant events" in the case, states, in item "(7) merely the following:

"Stipulation discontinuing state court suit: February 27, 1981 (A-48)" (reply brief, pp. 1-2).

Furthermore, Prudential, in its principal brief in the Court of Appeals (the only brief in which it set forth the "Issues" presented by the appeal), did not list as an issue the question whether the federal court action was barred because the state court action had, as Prudential had originally, but mistakenly, contended, been discontinued with prejudice.

Finally, neither of the courts below treated the federal court action as barred because the state court action had, as Prudential had originally, but mistakenly, contended, been discontinued with prejudice.

PRUDENTIAL'S RENEWED MOTION TO DISMISS THE COMPLAINT ON THE GROUND THAT DEL RE HAD NO STANDING TO COMMENCE OR MAINTAIN THE ACTION

On or about May 7, 1971, Prudential, having obtained copies of Del Re's compensation records, which showed, among other things, the date when he accepted compensation under an award in a compensation order filed by a deputy commissioner (namely, February 25, 1977; 31a*), renewed its motion to dismiss the complaint on the ground that Del Re had no standing to commence or maintain the federal court action (which had been instituted on April 28, 1980; 34a-38a, 45a, last par., 64a, par. "10"; 4a, second par.), because he had failed, although required so to do, to bring the action within six (6) months of February 25, 1977 (61a-66a).

*to be read with 27a-30a

DEL RE'S OPPOSITION TO PRUDENTIAL'S RENEWED MOTION TO DISMISS, AND THE BASIS THEREOF: NAMELY, (1) THE LETTER FROM THE COMPENSATION CARRIER FOR DEL RE'S EMPLOYER, (a) RATIFYING THE COMMENCEMENT AND CONTINUATION OF THE ACTION, AND (b) REASSIGNING TO DEL RE THE CAUSE OF ACTION AGAINST PRUDENTIAL FOR DEL RE'S PERSONAL INJURY DAMAGES,* AND (2) DEL RE'S ACCEPTANCE OF THE RATIFICATION AND REASSIGNMENT, AND THE OTHER TERMS AND PROVISIONS**

Del Re opposed Prudential's motion on the ground that he did have standing to commence and maintain the action, predicating that claim on a letter written by his employer's compensation carrier, the State Insurance Fund, to his attorneys, subsequent to the commencement of the action, which letter was attached to his counsel's affirmation (69a-70a, to be read with 67a-68a), and which we summarize in a moment.

The carrier, the State Insurance Fund, was the assignee, by operation of law, of Del Re's right to sue the ship-

* AND CONTAINING CERTAIN UNDERTAKINGS BY THE CARRIER, ETC.

**OF THE LETTER

owner, because of the two related facts (1) that it had been subrogated to the rights of Del Re's employer, the stevedore, by virtue of the fact that it had paid the compensation benefits to Del Re (see pp. 6-7 supra, and 33 U.S.C., section 933(h)*), and (2) prior to the commencement of the action six (6) months had elapsed since Del Re's acceptance of an award in a compensation order made by a deputy commissioner.** 33 U.S.C., section 933(b); Rodriquez v. Compass Shipping Co. Ltd., _____ U.S. _____, 101 S. Ct. 1945, supra.*

In its letter to Del Re's attorneys, dated May 12, 1981, the State Insurance Fund (69a-70a) stated that it was "the Longshoremen's Act Insurer of Northeast Stevedoring Co., Inc.," Del Re's employer on May 7, 1975, the date Del Re was injured while working aboard a vessel owned

*also 5a and 20a (second par.)
** See p. 8, supra.

by Prudential Lines Inc. (69a, first par.).

The State Insurance Fund went on to say that it ratified Del Re's commencement and continuance of his action against Prudential Lines, and that if its ratification was sufficient to preserve to Del Re ownership of the cause of action - plainly indicating its intention, first, to ratify the action, and then immediately following, to reassign to Del Re the cause of action against the shipowner for Del Re's injuries, previously assigned to it by operation of law - it would not institute a separate action against Prudential, but, instead, would be bound by any judgment in the action insofar as it determined liability, or lack thereof, for the accident, and the amount of damages recoverable, if any, as well as by any release executed by Del Re with its approval (69a-70a).

However, the letter continued, insofar as concerned the compensation benefits the State Insurance Fund had paid to Del Re, the Fund

would have a lien and credit rights for same, which would attach to the proceeds of any recovery in the action by way of judgment or settlement, and that said lien and credit rights were not in any way released or extinguished (70a).

In sum, the State Insurance Fund in effect pledged to Prudential* the protection of not having to face a separate action by the Fund, and the benefit of any judgment in the action determining the issues of liability and damages, if any, being res judicata as to the Fund.

Del Re not only accepted, but also relied upon, the carrier's ratification of the commencement and continuation

*albeit somewhat circuitously, making the pledge, as it did, to Del Re's attorneys

of his action, and reassignment to him of the cause of action alleged in the complaint for personal injury damages against the shipowner, doing so six (6) days after the Fund had sent its letter - more particularly, on May 18, 1981 - when his attorneys, in opposition to Prudential's renewed motion, submitted (1) the Fund's letter of ratification, reassignment, etc., addressed to Del Re's attorneys, dated May 12, 1971 (69a-70a), and (2) an affirmation by one Howard Fishkin, an attorney associated with Del Re's attorneys, in which Mr. Fishkin relied upon said letter as being sufficient to defeat Prudential's motion (67a-68a).

THE DISTRICT COURT'S DENIAL, IN AN OPINION, OF PRUDENTIAL'S RENEWED MOTION TO DISMISS THE COMPLAINT

On June 18, 1981 Judge Sand denied Prudential's motion to dismiss the complaint, doing so in an opinion (19a-23a*).

Preliminarily, Judge Sand held that the State Insurance Fund, Del Re's employer's compensation carrier on the day of the accident (69a, first par.), had been subrogated to all rights of Del Re's employer, pursuant to 33 U.S.C., section 933(h) (20a, second complete par.). That holding was compelled by the fact that Del Re's compensation records, which were attached to Prudential's moving affi-

*The heading in the Appendix for each page of the opinion erroneously states that the opinion, which is dated June 18, 1981, was filed on January 19, 1981 (19a-23a). The opinion was filed on June 19, 1981, as indicated directly below the caption of the case at the first page of the opinion (19a).

davit, made by John F. McHugh, its counsel, as Exhibit "E" (64a, par. "7", to be read with 65a, par. "14"), disclosed that the State Insurance Fund had paid the compensation benefits to Del Re (27a-31a; see, also, pp. 6-7, supra).

Judge Sand held that the carrier's ratification conferred standing upon Del Re to continue and maintain the action (19a-23a) (but - and here we add our own gloss - for the benefit, of course, of the carrier, as the real party in interest, subject to the provisions of 33 U.S.C. section 933(e) respecting the distribution of the proceeds of any recovery in the action, in the absence, of course, of an agreement between the carrier and the longshoreman covering the same subject matter).

Judge Sand also appears to have

held, albeit somewhat elliptically and obliquely, that the carrier's letter to Del Re's attorneys, to which he referred in some detail, also amounted to a reassignment by the carrier to Del Re of the cause of action against the shipowner (21a, 22); see also pp. 34-36, 38-42, infra.

In reaching the conclusion that the carrier's ratification conferred standing upon Del Re to continue and maintain the action Judge Sand relied upon "a number of decisions in this district rendered after the Court of Appeals decision in Rodriguez, 617 F. 2d 955 (2d Cir., 1980), but prior to the Supreme Court's affirmance*, upholding the efficacy of such a ratification" (20a, last, but incomplete, par.), referring to the ratification by the car-

*_____ U.S. _____, 101 S Ct. 1945 (May 18, 1981)

rier in this case, dealt with by Judge Sand in the preceding paragraph (20a, second complete par.).

In Rodriguez v. Compass Shipping Co., supra (2 Cir., May 19, 1980), 617 F. 2d 955, involving facts virtually identical to those at bar, the Court of Appeals, at 958 (section "(2)" of the opinion), in effect held - and the holding was essential to its decision in the case - that had the statutory assignee of the cause of action against the shipowner for the longshoreman's personal injury damages (in that case the employer; sec. 33 U.S.C., section 933(b), but see "(h")" for compensation carrier as the statutory assignee) ratified, as the real party in interest, the commencement of the action brought by the longshoreman, in his own name, after the expiration of the prescribed 6-month period (33 U.S.C., section

933(b)), the ratification would have conferred standing upon the longshoreman to continue and maintain the action (but - and here we again add our own gloss - for the benefit, of course, of the statutory assignee, the employer in that case, and the real party in interest, subject, of course, to the provisions of 33 U.S.C., section 933(b), respecting the distribution of the proceeds of any successful recovery in the action, in the absence, of course, of an agreement between the carrier and longshoreman covering the same subject matter).

The precise context in which the Court of Appeals holding was rendered is as follows (p. 958 of 617 F. 2d, at section "(2)" of the opinion):

> "The defense raised by the defendants, that plaintiff is not the real party in interest,

may always be invoked pursuant to F.R. Civ. P. 17(a), which provides that every action shall be prosecuted in the name of the real party in interest. Without this defense a defendant might be exposed to multiple suits based on the same claim. United Federation of Postal Clerks v. Watson, 133 U.S. App. D.C. 176, 184 & n. 34, 409 F. 2d 462, 470 & n. 34 (D.C. Cir.), cert. denied, 396 U.S. 902, 90 S Ct. 212, 24 L. Ed. 2d 178 (1969).* A person, such as the employer here, to whom a claim has been assigned under section 33(b), is the real party in interest. Aetna Life Ins. Co. v. Moses, 287 U.S. 530, 53 S Ct. 231, 77 L. Ed. 477 (1933); Moore v. Hechinger, 75 U.S. App. D.C. 391, 127 F. 2d 746 (D.C.Cir. 1942). Assuming the assignment here to be valid, the right to

*Compare the agreement by the carrier in the case at bar, made by it at the time it ratified the commencement and continuation of Del Re's action, that it would not institute a separate action against Prudential, but, instead, would be bound by any judgment which might be rendered in the action determining the issues of liability and the amount of damages, if any, as well as by any release executed by Del Re with its consent, the carrier exacting, in exchange, only a lien and credit rights on the proceeds of any recovery in the action by way of judgment or settlement, to attach to said proceeds (69a-70a).

sue is exclusively that of the employer, which has not joined in the action or ratified its commencement even though it has had a reasonable time to do so.* The defense of assignment therefore is properly asserted as a procedural matter by the defendants." (Underscoring supplied).

From all the foregoing it is abundantly clear, we submit, first, that the Court of Appeals in effect held that had the statutory assignee of the cause of action (in that case the employer) ratified, as the real party in interest, the commencement of the action brought by the longshoreman, in his own name, after the expiration of the prescribed 6-month

*Rule 17(a) provides that "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

period, the ratification would have conferred standing upon the longshoreman to continue and maintain the action (but - and here we add our own gloss - for the benefit of the carrier, the real party in interest, subject, of course, to the provisions of 33 U.S.C., section 933(e), respecting the distribution of the proceeds of any recovery in the action, in the absence, of course, of an agreement between the carrier and the longshoreman covering the same subject matter).

Secondly, it is also clear from all the foregoing that the holding referred to was and is essential to the decision in the case, which affirmed the dismissal of the action.

The holding aforesaid in Rodriguez, supra, 617 F. 2d 955, 958 (at "(2)") was handed down on March 19, 1980. The

ratification by the carrier in this case - given in obvious reliance on the holding - took place on May 12, 1981, fourteen (14) months later (69a-70a).

We turn now to the decisions, cited by Del Re's attorneys to Judge Sand, rendered in the Southern District of New York, where Judge Sand sat, "after the Court of Appeals decision in Rodriguez, 617 F. 2d 955 (2d Cir., 1980), but prior to the Supreme Court's affirmance, upholding the efficacy of such a ratification" (20a, last, but incomplete par.), referring to the ratification in the case at bar (20a, second complete par.).

MOTTA V. RESOURCE SHIPPING AND ENTERPRISES CO. (D.C. S.D. N.Y., OCT. 1980; TENNEY, J.), 499 F. SUPP 1365-1377, ONE OF THE CASES RELIED UPON BY JUDGE SAND IN THE DISTRICT COURT, INVOLVING THE SAME CARRIER AS IN THE CASE AT BAR, AND A LETTER OF RATIFICATION, ETC. VIRTUALLY IDENTICAL TO THE ONE IN THE CASE AT BAR

One of the cases relied upon by Judge Sand in support of his conclusion that the ratification by the carrier, as the real party in interest, of the commencement and continuation of Del Re's action, pursuant to Rule 17(a), was sufficient to confer standing upon Del Re to continue and maintain the action, was Motta v. Resource Shipping and Enterprises Co. (D.C. S.D. N.Y. N.Y., 1980; Tenney, D. J.), 499 F. Supp. 1365 (20a, last, but incomplete par. - 21a), in which the carrier, as in the case at bar, was the State Insurance Fund, and the ratification by the

Fund, as in the case at bar, was embodied in a letter to the plaintiff-longshoreman's counsel, which was virtually identical to the letter in the case at bar (cf. 1368 and 69a-70a).

In Motta, supra, Judge Tenney took the position with respect to the ratification holding in Rodriguez v. Compass Shipping Co. (2 Cir., March 19, 1980), supra, 617 F. 2d 955, 958 (at "(2)"), aff'd. on other grounds, _____ U.S. _____, 101 S Ct. 1945, 1955, discussed at pp. 25-30 supra, that since the question of ratification was, as he concluded, not directly before the Court of Appeals, the holding did not possess precedential value, but was nevertheless entitled to "due respect", 499 F. Supp. 1365, at pp. 1367-1368, 1368 (at "2") - 1369.*

*Petitioner Del Re, for the reasons set forth at pp. 25-30 supra, takes the position that the ratification holding in Rodriguez, supra, 617 F.2d, 955, 958, does possess precedential value, since it was essential to the decision in that case, and indeed forms an integral part of that decision.

Judge Tenney then embarked on a 19-page comprehensive and exhaustive, carefully and closely reasoned, exposition of the law of ratification, collecting and reviewing the authorities and concluding that the ratification in the case before him - which, we repeat, was given by the same carrier as in the case at bar, and in a letter virtually identical to the one at bar (cf. 1368 and 69a-70a) - was sufficient to confer standing upon Motta, pursuant to Rule 17(a), to continue and maintain the action.

Because of the comprehensive and exhaustive nature of the opinion, and its closely reasoned character, the usual summary and/or selected extracts would, we respectfully submit, not fairly and accurately convey the overwhelming impact of its irresistible logic, and would do the opinion an egregious disservice. Accord-

ingly, we refrain from submitting a digest of the opinion or employing selected portions therefrom, but respectfully suggest that the opinion should be read in its entirety.

JUDGE SAND'S APPARENT CONCLUSION, ALBEIT SOMEWHAT ELLIPTICALLY AND OBLIQUELY EXPRESSED, THAT THE CARRIER'S LETTER IN THIS CASE ALSO AMOUNTED TO A REASSIGNMENT BY THE CARRIER TO DEL RE OF THE CAUSE OF ACTION AGAINST PRUDENTIAL FOR DEL RE'S PERSONAL INJURY DAMAGES

Judge Sand appears to have held, but somewhat elliptically and obliquely, that the State Insurance Fund's letter to Del Re's attorneys (69a-70a), besides constituting a ratification by the Fund of the commencement of Del Re's action, pursuant to Rule 17(a), was also a reassignment by the Fund to Del Re of the cause of action against Prudential for Del Re's personal injury damages (20a, from last, but incomplete par. - 21a). See, also, pp.34-36, 38-40, infra.

In reaching that conclusion, Judge Sand appears to have relied, albeit sub silentio, first, upon that portion of the Fund's letter which states that "If ratification is sufficient to preserve to plaintiff-claimant (Del Re) ownership of the cause of action" (69a), it will not institute a separate action against Prudential, but, instead, will be bound by any judgment in the action determining the issues of liability and the amount of damages, as well as by any release executed by Del Re with its approval, and that the Fund has a lien and credit rights for the compensation benefits paid by it, on the proceeds of any recovery in the action by judgment or settlement (69a-70a).

Secondly, Judge Sand expressly relied upon Caldwell v. Ogden Sea Transport Inc. (4 Cir., 1980), 618 F. 2d 1037,

1047-1048 (at "IV") (20a, from last, but incomplete par. - 21a), holding that an actual reassignment to a longshoreman or other harbor worker by a statutory assignee of a cause of action against a third party (such as a shipowner) for the longshoreman's or harbor worker's personal injury damages (the assignee achieving this status perforce 33 U.S.C., section 933(b) or (h)),would be effective to revest the cause of action in the longshoreman or other harbor worker.

Upon the basis of all the foregoing considerations the District Court denied Prudential's renewed motion to dismiss the action, made on the ground of Del Re's alleged lack of standing to commence it and maintain it (28a).

THE DISTRICT COURT'S AMENDED ORDER AND OPINION, PURSUANT TO 28 U.S.C., SECTION 1292(b), CERTIFYING THE QUESTION OF THE EFFECTIVENESS OF THE CARRIER'S RATIFICATION FOR INTERLOCUTORY REVIEW

On July 7, 1981, the District Court, pursuant to 28 U.S.C., section 1292(b), certified for interlocutory review the question "whether a longshoreman's personal injury claim commenced within the period of the statute of limitations but more than six (6) months after receipt of compensation benefits may be maintained pursuant to F.R. Civ. P. 17(a), where the Longshoremen's Act Insurer of plaintiff's employer (as to whom the statute of limitations would bar an independent action) ratifies plaintiff's suit" (25a, to be read with 24a).

THE DECISION OF THE COURT OF APPEALS ANSWERING THE CERTIFIED QUESTION IN THE NEGATIVE, REVERSING THE DISTRICT COURT AND REMANDING WITH DIRECTIONS TO DISMISS THE COMPLAINT

On January 21, 1982, the Court of Appeals, in an opinion and accompanying judgment, answered the certified question in the negative, reversed the District Court, and remanded the case to that court with directions to dismiss the complaint (13a, to be read with 1a-12a; 32a-33a).

The opinion is reported at 669 F. 2d 93.

Initially, it should be noted that despite the fact that (a) the carrier's letter to Del Re's attorneys was susceptible of the construction that the carrier not only ratified the commencement of the action, but, at the same time, also reassigned the cause of action against Prudential to Del Re (the letter states that "If our ratifica-

tion is sufficient to preserve to plaintiff-claimant ownership of the cause of action", the carrier will not institute a separate action against Prudential, but will be bound by any judgment in the action determining the issue of liability and the amount of damages, if any, etc., etc., 69a-70a), (b) the District Court also appears to have reached a similar conclusion, although its finding concerning reassignment of the cause of action is somewhat elliptical and oblique in character (20a, from last, but incomplete, par. -21a), (c) Prudential's brief in the Court of Appeals presented, as one of the issues in the case, the question whether the carrier validly reassigned the cause of action* (brief, p. 2, question "2"), and presented arguments on the question, against the validity of the reassignment;(brief, POINT I, pp. 6, 7, 8, 9, 10-11; POINT II, pp. 11,

*to Del Re; respondent contended that the carrier had done so

12, 13; POINT III, pp. 14, 15), and (d) Del Re, in his brief in the same court, while initially contending that the carrier did not reassign the cause of action to Del Re (brief, POINT III, p. 11), nevertheless, immediately following, urged that reassignment by the statutory assignee to the longshoreman or other harbor worker of a cause of action against a third party for the longshoreman's or other harbor worker's personal injury damages was proper, valid and effective (brief, pp. 11-14) - notwithstanding the foregoing facts, the Court of Appeals, in its opinion, made no reference to the question of reassignment or its effectiveness (1a-13a).

While it is true that the District Court did not certify for interlocutory review the question of the reassignment and its effectiveness, nevertheless, that fact did not prevent the Court of

Appeals from considering and deciding the question. 7B Moore's Federal Practice (Second Ed., 1981), section 1292, p. JC-421); Yamamoto v. Omiya, (9 Cir., 1977), 564 F. 2d 1319, 1325 ("IV", "(7-9)", first par.).

With respect to the question whether ratification of the commencement of Del Re's action by the State Insurance Fund (the statutory assignee of Del Re's cause of action against Prudential; 33 U.S.C., section 933(b)(h), and the real party in interest) could confer standing upon Del Re to continue and maintain the action, pursuant to Rule 17a (but, of course, for the benefit of the Fund, as the real party in interest), the Court of Appeals, while ruling that the Fund could not ratify the commencement of the action, did not, however, (a) make any reference to its previous holding in Rodriquez v.

Compass Shipping Co. (March 19, 1980), 617 F. 2d 955, 958 (at "(2)"), a case involving facts virtually identical to those at bar, and discussed at pp. 25-30, supra - a holding necessary to the decision in that case - that ratification by the statutory assignee of the longshoreman's cause of action against the shipowner (in that case the longshoreman's employer) would have conferred standing upon the longshoreman, pursuant to Rule 17a, to continue and maintain the action, let alone (b) attempt to reconcile its decision in the case at bar with its decision in Rodriquez, supra. The Court of Appeals, in the case at bar, was, we respectfully submit, bound to follow its decision in Rodriquez, supra (1a-13a). United States v. Olivares-Vegas (2 Cir., 1974), 495 F. 2d 827, 829 (at "(1)", first par.).

Not only is the decision of the Court of Appeals in this case in conflict

with its decision in Rodriquez, supra, but the reasons it relies upon in its opinion in this case to support its conclusion that the ratification by the carrier is ineffective to confer standing upon Del Re to continue and maintain the action, are, we respectfully submit, shown to be without persuasive force upon examination of the decision and opinion in Motta v. Resource Shipping & Enterprises Co. (D.C. S.D. N.Y., 1980; Tenney, D.J.), 499 F. Supp. 1365, an action in which the carrier was, as in the case at bar, the State Insurance Fund, and the letter of ratification, etc. from the Fund to Motta's attorney was, in all material and essential particulars, identical to the letter of ratification from the Fund to Del Re's attorneys (cf 136 and 69a-70a).

Judge Tenney, in Motta, supra, went directly to the heart of the matter

when ,quoting from the notes of the Advisory Committee, Fed. R. Civ. P. 17(a), 1966 Amendment, he wrote (at p. 1371, rt. hd. col., at "(5-7"), first par.):

> "The purpose of the real party in interest rule is 'to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata' .. ... A letter or document that ratifies the commencement and continuation of an action may be sufficient to cure any real party in interest defects in the suit. de Uries v. Weinstein Int'l, Corp., 80 F.R.D. 452, 459 C.D. Minn. 1978); Clarkson Co. v. Rockwell Int'l. Corp., 441 F. Supp. 792, 797-98 (N.D. Cal. 1977); Wright & Miller, Federal Practice and Procedure: Civil section 1555, at 709. The district court has discretionary authority to determine whether ratification is appropriate in a given case. James v. Nashville Bridge Co., 74 F.R.D. 595, 597 (N.D. Miss. 1977); Southern Nat'l. Bank of Houston v. Tri Financial Corp., 317 F. Supp. 1173, 1188 (S.D. Texas 1970). This discretion must be exercised in a manner

consistent with the Rule's purpose to protect the defendant from subsequent litigation and to finally resolve the dispute at hand. See James v. Nashville Bridge Co., supra, 74 F.R.D. at 597; Prudential Lines Inc. v. General Tire Int'l. Co., 74 F.R.D. 474, 476 (S.D. N.Y. 1977)."

The letter of ratification submitted in that case states that The State Insurance Fund, Northeast's insurance company and the real party in interest, ratifies Motta's commencement and continuance of the suit.* The insurance company agrees to be bound by any judgment rendered in the action that determines liability and damages. Furthermore, it recognizes that it would be bound by any release Motta executed with the insurance company's approval. It also asserts that it will not institute a separate action against Resource. The State Insurance Fund expressly reserves its lien and credit rights and states that they will "attach to the proceeds" "resulting

*See letter at p. 1368 of 499 F. Supp.

from any recovery by way of judgment or settlement".

The letter in the case at bar is, in all essential particulars, identical to the one in Motta. And, as in Motta, it manifestly serves "to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata". Notes of Advisory Committee, Fed. R. Civ. P. 17(a), 1966 Amendment.

THE BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The court of first instance in this case was and is the United States District Court for the Southern District of New York (34a, 35a-38a, 39a-45a, 4a, second complete par., 19a-23a, 24a-25a,

26a). That court had (and still has) original jurisdiction of the action perforce the provisions of 28 U.S.C., section 1332(a)(2)(3)(c), for these reasons:

(1) The action is a civil one (35a-38a).

(2) The matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs (35a, par. "IV").

(3) At the time of the commencement of the action, the action was (and still is) between a non-citizen, plaintiff Angelo Del Re (petitioner herein) (35a, par. "III"), and a citizen of the State of New York: namely, defendant Prudential Lines, Inc., a citizen of said State because of being a domestic corporation - that is, a corporation incorporated in the State of New York (35a, par. "I") - and also because of being a corporation

having its principal place of business in the Borough of Manhattan, City of New York (35a, par. "II"), which is in the State of New York.

REASONS FOR GRANTING CERTIORARI

The extraordinary importance and unsettled nature of the basic questions presented for review

After this Court, in Rodriguez v. Compass Shipping Co. (May 18, 1981), _____ U.S. _____, 101 S Ct. 1945, had decided that the statutory assignee (in that case the employer) of a longshoreman's cause of action for personal injury damages against a negligent third party (in that case a shipowner) - to whom the cause of action had been assigned because the longshoreman had failed to bring such action within the 6-month period prescribed by 33 U.S.C., section 933(b) for doing so - (a) could not be

required either to pursue the third-party claim (101 S Ct., at p. 1950, rt. hd. col.), nor to reassign the cause of action to the longshoreman (id., at p. 1950, rt. hd. col., first complete par., pp. 1955-1956, "III"), since, among other reasons, the statutory assignee has exclusive control of the cause of action (101 S Ct., at p. 1955, left hd. col., carry-over paragraph from p. 1954; p. 1949, left hd. col.), it was only natural, indeed inevitable, that the day would soon come when this Court would be asked, as the instant petition does, to decide whether that exclusive control permits the statutory assignee, where the longshoreman has brought an action against the shipowner after the expiration of the 6-month period prescribed for doing so, voluntarily either to ratify, as the real party in interest, pursuant to F.R. Civ. P. 17(a), the commencement of the action, or to reassign

the cause of action to the longshoreman, or both, as in the case at bar (ratification; 68a-70a; reassignment; pp. 19, 23-24, 34-36, 38-42, supra; 69a-70a, 21a*

That the Court would one day be asked to resolve said question or questions was to be expected in view of the fact that those questions, which daily recur in litigation in both federal and state courts throughout the country (see, e.g., the case at bar, Motta v. Resource Shipping & Enterprises Co. (D.C. S.D. N.Y., Tenney, D.J., Oct. 22, 1980), 499 F.Supp. 1365, and illustrative state court cases (20a-21a), relied upon by the District Court in the case at bar in upholding ratification by the carrier, who had been subrogated to the employer's rights, by virtue of its payment of the compensation benefits, 33 U.S.C., section 933(h), to be read with "(b)"; see 20a, second complete par., and 20a-21a)), these questions are of incalculable importance, as well as immediate

*See Caldwell v. Ogden Sea Transport, Inc. (4th Cir. 1980), 618 F. 2d 1037, 1047-1048.

and pressing urgency, to the hundreds of shipping companies, the hundreds of stevedoring companies, the hundreds of compensation carriers for the latter companies, and the tens of thousands of longshoreman, all engaged in the various aspects of maritime transportation of cargo throughout not only the country, but indeed the world, and finally/of importance to the courts, both federal and state, as well as the legal profession throughout the country, which grapple with said recurrent questions on virtually a daily basis.

In light of the foregoing facts, which conclusively demonstrate the towering importance of the questions, their endlessly recurrent nature, and their unsettled character and status, certiorari, it is respectfully submitted, should be granted to resolve them.

The conflict between the Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York

With respect to the question whether the statutory assignee of the cause of action against a negligent shipowner for a longshoreman's personal injury damages, may, where the longshoreman has brought such an action after the expiration of the 6-month period prescribed for doing so, effectively, as the real party in interest, pursuant to F.R. Civ. P. 17(a), ratify the commencement of said action, there is a direct conflict between, on the one hand, the decision of the Court of Appeals for the Second Circuit in this case(1a-13a, 669 F. 2d 93), holding that such ratification by the carrier is without force or effect, and, on the other hand, a recent decision of the United States District Court for

the Southern District of New York, sustaining such ratification, Motta v. Resource Shipping & Enterprises Co. (Oct. 22, 1980; Tenney, D.C.), supra, 499 F. Supp. 1365, relied upon by the District Court in the case at bar (20a-21a), involving facts virtually identical to those in the case at bar, including the fact that the carrier in that case and the carrier in the case at bar are the same: namely, the State Insurance Fund (cf. 499 F. Supp., p. 1368 and 69a-70), and the letter of ratification, etc. in that case from the Fund to Motta's attorney is, in all material and essential respects, identical with the letter in this case from the Fund to Del Re's attorneys (cf. 499 F. Supp., 1368 and 69a-70a).

We have, supra, at pp. 31-34, briefly discussed the salient features of

the decision and opinion in Motta v. Resource Shipping and Enterprises Co., supra, 449 F. Supp. 1365-1377. We would add only - and we say this with the utmost deference due the Court of Appeals for the Second Circuit - that in our view the Motta opinion is a more comprehensive and better reasoned analysis of the subject of ratification, and its application to the very kind of ratification which was and is involved in both Motta, supra, and the case at bar.

Moreover, the efficacy of "such a ratification" was, as the District Court noted in the case at bar (20a-21a), also upheld in De Luzio v. Trans-American Trailer, Inc., Supreme Court of the State of New York, County of New York, County Clerk's #12339/80 (Altman, J.), and Sucino v. Akron Shipping Co., Supreme Court of the State of New York, County of New York, County Clerk's #13029/80 (Wallach, J.).* The District Court

*These decisions appear not to have been reported.

in the case at bar, in upholding ratification by the carrier, also relied upon said decisions.

In view of the transcendental importance of the ratification question, its recurrent nature, and its unsettled character and status, certiorari, it is respectfully submitted, should be granted, to resolve the conflict between the Court of Appeals for the Second Circuit in this case and the United States District Court for the Southern District of New York in Motta v. Resource Shipping & Enterprises Co., supra, 499 F. Supp. 1365.

(a) The intra-circuit conflict in the Court of Appeals for the Second Circuit between the decision in this case and one of the holdings in Rodriquez v. Compass Shipping Co.(March 19,1980), 617 F.2d 95, 98 (at "(2)") affd. on other grounds,_____ U.S. _____, 101 S Ct. 1945

(b) The reliance of the carrier and petitioner upon the holding in Rodriquez, supra

In Rodriquez v. Compass Shipping

Co. (March 19, 1980), 617 F. 2d 95, 98 (at "(2)"), affd. _____ U.S. _____ 101 S Ct. 1945, a case involving facts virtually identical to those in the case at bar, the Court of Appeals for the Second Circuit, on March 19, 1980, in a decision by a panel consisting of Circuit Judges Waterman, Moore and Mansfield, one year and ten (10) months prior to the decision in the case at bar, on January 21, 1982, by another panel of the same court, consisting of Circuit Judges Lumbard, Mansfield and Newman, as shown more fully at pp. 25-30, supra, had, at 617 F. 2d 95, 98 (at "(2)"), held - and, as we see in a moment, the holding was essential to, and an integral part of, the decision in Rodriquez, supra - that where the longshoreman had brought an action for personal injury damages against a negligent shipowner after the expiration of the 6-month period prescribed for doing so (33

U.S.C., section 933(b)), the longshoreman would have had standing to continue and maintain the action, for the benefit of the assignee, as the real party in interest,* if the assignee had, pursuant to F.R. Civ. P. 17(a), ratified the commencement of the action. Rodriquez, supra, 617 F. 2d, at p. 958 (at "(2)"). See pp. 25-30, for exposition in full of the foregoing holding and the fact that the holding was essential to, and an integral part of, the decision in that case.

One year and ten (10) months later, however, in the case at bar, in which the facts are virtually identical to the facts in Rodriquez, supra, the same court, albeit by a different panel, held

*subject, of course, to the provisions of 33 U.S.C., section 933(e), governing the distribution of the proceeds of any recovery in the action.

that ratification by the statutory assignee (in this case the carrier) of the longshoreman's untimely and barred action, was without force or effect. In so doing, however, the court made no reference to the holding in Rodriquez, supra, described above, concerning ratification.

That same court, however, had previously held, in United States v. Olivares-Vega (1974), 495 F. 2d 827, at 829 (at "(1)", first par.), that

> "We are, of course, bound by the decisions of this circuit unless they can be distinguished from the facts of this case...."

The material and essential facts of the case at bar, however, we submit, cannot be distinguished from the similar facts in Rodriquez, supra. Indeed, the essential and material facts in both cases are virtually identical.

The ratification by the carrier in this case took place on May 12, 1981 (69a-70a), fourteen (14) months after the ratification holding in Rodriquez, supra, on March 19, 1980, and in obvious reliance thereon. Petitioner, in accepting the ratification, as he did (67a-68a), also manifestly relied upon the Rodriquez holding.

That such reliance was to be expected is evident from the case of Motta v. Resource Shipping & Enterprises Co., supra (D.C. S.D. N.Y., Oct. 22, 1980; Tenney, D.J.), 499 F. Supp. 1365, involving the same carrier as in the case at bar, the State Insurance Fund (cf. 69a-70a and 499 F. Supp., at p. 1368), and a letter of ratification, etc. from the Fund to Motta's attorney, which, in every material and essential respect, is identical to the letter from the Fund to the attorneys for

petitioner herein (cf. 69a-70a and 449 F. Supp., at p. 1368). In Motta, supra, at p. 1368 (rt. hd. col., to be read with 1367-1368), as Judge Tenney noted, Motta, "(s)eizing on"the holding in Rodriquez, supra, 617 F. 2d, at p. 98 (at "(2)"), quoted in Motta at pp. 1367-1368, of 499 F. Supp., "procured a letter from Northeast's (the stevedore's) insurance company asserting that it ratified the plaintiff's commencement of the action" (p. 1368, rt. hd. col.*).

In view of the recurrent and unsettled nature and status of the question, and its obviously monumental importance,

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*In Motta, supra, Judge Tenney held that the question of ratification was not directly before the court in Rodriquez, supra, and that, therefore, the holding concerning ratification was not entitled to precedential value, but was nevertheless entitled to "due respect". 499 F. Supp. 1365, at pp. 1368-1369.

and the reliance of the carrier and petitioner upon the Rodriquez ratification holding, certiorari, it is respectfully submitted, should be granted to resolve the intra-circuit conflict described above.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH CHEVRON OIL CO. V. HUSON, 404 U.S. 97, AND DENIES PETITIONER AND THE CARRIER THE DUE PROCESS DUE THEM UNDER THE FIFTH AMENDMENT

The facts in support of this point are the same as those set forth at pp. 55-61, supra, concerning the intra-circuit conflict in the Second Circuit Court of Appeals.

The Court of Appeals in this case, in unexpectedly overruling, albeit sub silentio, its prior holding in Rodriquez v. Compass Shipping Co., supra, 617 F. 2d 955, 958 (at "(2)"), affd. on other grounds, _____ U.S. _____, 101 S Ct. 1945

that ratification by the statutory assignee, pursuant to Rule 17(a), of the commencement of an action brought by a longshoreman after the expiration of the 6-month period prescribed for doing so, would confer standing upon the longshoreman to continue and maintain the action - a holding upon which petitioner and the carrier relied - and applying the overruling retroactively in and to the case at bar, acted contrary to Chevron Oil Co. v. Huson (1971), 404 U.S. 97, 106-107, and denied petitioner and the carrier the due process due them under the Fifth Amendment to the Constitution of the United States. See, for parity of reasoning, Brinkerhoff-Faris Co. v. Hill (1930), 281 U.S. 673, as explicated in Mullaney v. Wilbur (1975), 421 U.S. 684, 690, note 10.

IN DECLINING TO GIVE EFFECT TO THE CARRIER'S RATIFICATION AND REASSIGNMENT, AND PETITIONER'S ACCEPTANCE OF SAME, THE COURT OF APPEALS DENIED PETITIONER AND THE CARRIER THE DUE PROCESS PROPERTY RIGHTS DUE THEM UNDER THE FIFTH AMENDMENT

The cause of action against the negligent shipowner in this case for the longshoreman's personal injury damages, of which the carrier was the statutory assignee - that is, the one in whome the cause of action had vested - was and is a property right protected by the Fifth Amendment to the Constitution of the United States. Gibbes v. Zimmerman (1933), 290 U.S. 326, 332.

As statutory assignee, the carrier had exclusive control of the cause of action (Rodriquez v. Compass Shipping Co., supra, _____ U.S. _____, 101 S Ct. 1945, 1955; carry-over par. from 1954), which, as stated, is a property right.

That property right includes the right to exercise control by making any legitimate use or disposal of the thing owned. 16A C.S.S., Constitutional Law, section 599(b), pp. 696-698, and authorities there cited; see, for parity of reasoning, People v. Hawkins (1898), 157 N.Y. 1, 7; Sanderson v. City of Willmar (1968), 282 Minn. 5, 162 N.W. 2nd 494, 497 (at "4"). Ratifying the commencement of Del Re's action and reassigning the cause of action to Del Re represent a legitimate use and disposal of the cause of action.

In failing to give effect to the carrier's ratification and reassignment of the cause of action, and petitioner's acceptance of same, the Court of Appeals, it is respectfully submitted, deprived the carrier of the right to make legitimate use of its property, and petitioner of the right to accept said use for his benefit, and

consequently denied both of them the due process due them under the Fifth Amendment to the Constitution of the United States. Gibbes v. Zimmerman, supra, 290 U.S. 326, 332; People v. Hawkins, supra, 157 N.Y. 1, 7.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

IRVING B. BUSHLOW
Counsel of record
for petitioner

APPENDIX A

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT V - CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C., section 1332

Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between -

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the

plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant,

such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico, June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub. L. 85-554, section 2, 72 Stat. 415; Aug. 14, 1964, Pub. L. 88-439.

33 U.S.C., section 904

Liability for compensation

(a) Every employer shall be liable for and shall secure the payment

to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the sub-contractor has secured such payment.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

33 U.S.C., section 905(b)

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of

section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive

of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C., section 933

Compensation for injuries where third persons are liable

Election of remedies

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

Acceptance of compensation operating as assignment

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

Recoveries by assignee

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to --

(A) the expenses

incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compen-

sation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

Subrogation

(h) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

Rule 17(a) of the Federal
Rules of Civil Procedure

Parties Plaintiff and
Defendant; Capacity

Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed

after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

81-2315

No. .....

Office - Supreme Court, U.S.
FILED
JUN 3 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANGELO DEL RE,

Petitioner,

v.

PRUDENTIAL LINES, INC.,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 400 August Term, 1981

Argued: November 19, 1981 Decided: January 21, 1982

Docket No. 81-7591

Filed: January 21, 1982

ANGELO DEL RE,

Plaintiff-Appellee,

—against—

PRUDENTIAL LINES, INC.,

Defendant-Appellant.

Before:

LUMBARD, MANSFIELD and NEWMAN,

Circuit Judges.

Appeal from an order of the Southern District of New York, Leonard B. Sand, *Judge*, denying a motion by a shipowner to dismiss a longshoreman's negligence action against it on the ground that the action was time barred by §33(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §933(b). The district court certified for appeal the question of whether under Rule

Opinion Delivered Upon the Rendering of the Judgment Sought to Be Reviewed

17(a), F.R.Civ.P., an employer may ratify the commencement of an action brought by the employee in his own name and on his own behalf after the statutory period of limitations within which the employee might sue has passed and thereby prevent dismissal of the action on the ground that it is time barred.

Reversed.

WILLIAM SONENSHINE, Esq., New York, NY (Bernard Klieger, Esq., Klieger & Hartman, New York, NY, of counsel), *for Defendant-Appellant.*

MARTIN LASSOFF, Esq., New York, NY (Howard Fishkin, Esq., Zimmerman & Zimmerman, New York, NY, of counsel), *for Plaintiff-Appellee.*

WALKER & CORSA, New York, NY (Joseph T. Stearns, Esq., Sandra R. M. Gluck, Esq., New York, NY, of counsel), *for Amicus Curiae Central Gulf Steamship Corp., Bay Tankers, Inc., Seatrain Lines Inc., Moore-McCormack Lines, Inc.* and *Apex Marine Corp.*

MANSFIELD, *Circuit Judge*:

This is another in a series of cases[1] in which we have been required to interpret the statutory scheme Congress

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[1] See *Rodrigues* v. *Compass Shipping Co. Ltd.*, 617 F.2d 955 (2d Cir. 1980), *aff'd*, —— U.S. ——, 68 L.Ed.2d 472 (1981); *Verderame* v. *Torm Lines*, —— F.2d ——, No. 80-9061, Slip Op. at —— (Jan. 20, 1982).

established to compensate longshoremen and certain other maritime workers for work-related injuries. Section 33(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §933(b) (the "Act"), provides that "all right" that a longshoreman has to sue a negligent third party (usually a shipowner) for personal injury damages is automatically assigned to his employer unless the longshoreman commences an action against the third party within six months after he accepts compensation under an award in a compensation order of the Benefits Review Board.[1]

Prudential Lines, Inc. ("Prudential"), a shipowner, appeals from an order of the Southern District of New York, Leonard B. Sand, *Judge*, denying its motion to dismiss an action for damages for personal injuries by Angelo Del Re, a longshoreman, against it on the ground that the action is barred by §33(b)'s six-month time bar. The district court certified for appeal pursuant to 28 U.S.C. §1292(b) the question of whether under Rule 17(a), F.R.Civ.P., an employer may prevent dismissal under §33(b) by "ratifying" the employee's commencement of an action in his own name and on his own behalf after the statutory period limiting his right to sue has passed. Because Rule 17(a) in no way permits the circumvention of what we believe to be §33(b)'s absolute bar to suits by a longshoreman more than six

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[1] Section 33(b) provides:

"Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award."

months after he receives an award in a compensation order, we reverse.

Del Re was injured on March 7, 1975, while working for Northeast Stevedores, Inc. on a ship owned by Prudential. As a result of this accident Del Re was unable to work for 29 weeks and suffered permanent injury to his right arm and both of his legs. Northeast's insurance carrier, The State Insurance Fund, paid Del Re interim compensation during the period he was unable to work. On February 25, 1977, the Deputy Commissioner, Second Compensation District, of the U.S. Department of Labor approved an award of $13,935.58 and filed an award in a compensation order.

On October 17, 1977, Del Re commenced a personal injury negligence action against Prudential in the Supreme Court of New York. *Prudential did not respond in any way to the suit, but Del Re did not seek a default judgment.* On April 28, 1980, he commenced the instant federal action in the Southern District of New York. His action was brought in his own name, seeking damages on his own behalf for injuries in the course of his employment as a stevedore on March 7, 1975, aboard Prudential's ship S.S. Santa Barbara.

Prudential immediately moved to dismiss the action on grounds of laches and failure to bring the suit within six months after Del Re's receipt of the award under the Department of Labor compensation order, as required by §33(b). Since Prudential was unable at that time to show when the award in the compensation order was filed or when the settlement was agreed to by the parties, Judge Sand on January 30, 1981, denied the motion without prejudice to renewal. He further decided that the laches issue could best be decided after a trial. After the judge indi-

cated that Del Re should elect within 15 days whether he wished to seek a default judgment in the state court proceeding or to litigate in federal court, the parties filed a stipulation discontinuing the state court action.

After obtaining a copy of the compensation order, which was dated February 25, 1977, Prudential renewed its motion to dismiss, relying on the facts that the state court action was commenced on October 17, 1977, and the federal court action was commenced on April 28, 1980, both more than six months after the compensation award was filed. Del Re responded to the motion by obtaining a letter from Northeast's insurance carrier, The State Insurance Fund (which as subrogee of Northeast pursuant to 33 U.S.C. §933(h) was the sole possessor of the right to sue Prudential for Del Re's injuries) purporting to "ratify" the commencement of "his" action in his own behalf. Del Re argued that under Rule 17(a), F.R.Civ.P., The State Insurance Fund, the real party in interest, cured the admitted defect in the suit by ratifying his commencement of it, even though it was commenced on his own behalf. In an opinion dated June 18, 1981, Judge Sand agreed, denying Prudential's motion to dismiss but stating:

> "We are by no means unmindful of the paradox which results: the insurer cannot institute an action in its own name because the statute of limitations bars such a proceeding; the longshoreman cannot maintain an action in his own name because more than six months have elapsed since receipt of the compensation award; although neither the insurer nor the longshoreman, proceeding alone, can maintain the action, the consequence of the longshoreman having brought an action within the period of the statute of limitation in con-

junction with the ratification by the insurer, permits the action to be resuscitated under F.R.Civ.P. 17(a).[3]

Prudential then applied to have the question certified to this court pursuant to 28 U.S.C. §1292(b), which Judge Sand granted on July 7, 1981. We granted leave to appeal on August 11, 1981.

Discussion

Section 33(b) of the Act states in no uncertain terms that, unless an injured longshoreman brings suit against a third party within six months after receiving an award in a compensation order, all his rights against the third party are automatically assigned to his employer;[4] a longshoreman has no right thereafter to sue the third party. As the Supreme Court noted in *Rodriguez* v. *Compass Shipping Co. Ltd.*, —— U.S. ——, 68 L.Ed.2d 472, 487-88 (1981), the Longshoremen's and Harbor Workers' Compensation Act reflects a balancing of the conflicting interests of longshoremen, stevedore-employers, and shipowners. Congress' enactment in 1959 of the six-month rule benefited the injured longshoreman by allowing him time, after learning how much compensation he would receive from his employer, to decide whether to bring suit against the shipowner. Prior thereto the longshoreman's right to sue was terminated immediately upon receipt of the award. *Rodriguez* v. *Com-*

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[3] The district court's statement that an action by the employer would be barred by a state statute of limitations is incorrect. Such an action would be in admiralty and governed by the doctrine of laches. See *Czaplicki* v. *The Hoegh Silvercloud*, 351 U.S. 525, 533 (1956); *Hill* v. *W. Bruns & Co.*, 498 F.2d 565, 568 (2d Cir. 1974).

[4] See note 2 *supra*.

pass Shipping Co. Ltd., supra, —— U.S. at ——, 68 L.Ed.2d at 480; *Bloomer* v. *Liberty Mutual Ins. Co.,* 445 U.S. 74 (1980). But the six-month provision, while according the longshoreman a fixed period of time within which to make up his mind on whether to sue, also forces him to make his decision with reasonable promptness, thereby benefiting the shipowner, who desires a prompt resolution of all claims, and the stevedore-employer, who does not want to be delayed unduly in deciding whether himself to sue the shipowner for damages. Under the Act a successful recovery by the stevedore-employer would be applied toward reimbursement of any compensation payments made by it or its subrogated insurance carrier to the longshoreman and toward a reasonable attorney's fee, with 20% of any remaining balance being retained by the stevedore-employer and 80% paid to the longshoreman, 33 U.S.C. §33(e).

Thus §33(b)'s six-month rule represents a balancing of interests. Various provisions of the Act, while apparently unrelated, represent legislative trade-offs between the interests of these three concerned parties. Accordingly, we must tread warily when interpreting the Act and "adhere closely to what Congress has written." *Rodriguez* v. *Compass Shipping Co. Ltd., supra,* —— U.S. at ——, 68 L.Ed.2d at 488.

In *Rodriguez* v. *Compass Shipping Co. Ltd.,* 617 F.2d 955 (2d Cir. 1980), *aff'd,* —— U.S. ——, 68 L.Ed.2d 472 (1981), we considered whether, in spite of the clear language of §33(b), a longshoreman might be able to bring suit after the six-month period had passed. Rodriguez argued that his employer's failure to sue indicated a conflict of interest between him and it and that as a matter of public policy

the right to sue, when the stevedore-employer refuses to pursue it, should be reassigned as a matter of law to the longshoreman, relying upon *Czaplicki* v. *The Hoegh Silvercloud*, 351 U.S. 525 (1956). We rejected that argument, noting that *Czaplicki* involved a real conflict of interest: the employer's insurer, which by subrogation had acquired the employer's exclusive right to sue, was also the insurer of the shipowner's contractor, who faced liability as a defendant and as an indemnitor of the shipowner. Thus in *Czaplicki* the party holding the right to sue would have been suing itself if it had exercised that right. Moreover, at the time *Czaplicki* was decided, a shipowner could seek indemnity from an employer-stevedore for any damages it was required to pay to the employee, with the result that the employer might ultimately have to pay any damages that might be awarded. Thus, even without the "same insurer" conflict of interest, a stevedore-employer would have been unlikely to bring suit when *Czaplicki* was decided. These factors were no longer present when we decided *Rodriguez*. We therefore adhered to the statutory framework and held that at the expiration of the six-month period a longshoreman is completely divested of any rights he once had to bring suit against a shipowner.

On appeal the Supreme Court affirmed our decision and rejected the Fourth Circuit's attempt to fashion a longshoreman's right to demand reassignment when his stevedore-employer refuses to sue the shipowner. *Rodriguez, supra*, —— U.S. ——, 68 L.Ed.2d 472. The Court noted the delicate balancing of interests by Congress in §33(b). While holding out the possibility that *Czaplicki* might still be good law when an actual conflict of interest existed, it rejected "the fashioning of an entirely new set of remedies

to deal with an aspect of a problem that Congress expressly addressed." *Id.* at 486. It interpreted §33(b) as "an unequivocal statutory bar" to longshoreman suits against third parties after the passage of the six-month period. *Id.*

Against this background we are faced with Del Re's claim that §33(b) may be circumvented by a "ratification" of his action by the stevedore-employer, as the "real party in interest," pursuant to Rule 17(a), F.R.Civ.P. It was on this theory that the district court based its decision to deny Prudential's motion to dismiss, relying heavily on *Motta* v. *Resource Shipping & Enterprises Co.*, 499 F. Supp. 1365 (S.D.N.Y. 1980). Rule 17(a) provides in pertinent part that:

> "Every action shall be prosecuted in the name of the real party in interest. . . . No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

The Advisory Committee made clear in its accompanying Note that the provision allowing ratification, joinder, and substitution "is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made." The purpose of this "exception" to the requirement that all actions be prosecuted in the name of the real party in interest is therefore not to create new substantive rights, but to avoid

forfeiture in situations in which it is unclear at the time the action is filed who had the right to sue and it is subsequently determined that the right belonged to a party other than the party that instituted the action. See *Hoddin* v. *Policy Jury*, 49 F.R.D. 176, 180 (W.D. La. 1970) (3-judge court); C. Wright & A. Miller, *Federal Practice and Procedure* §555, at 707-08.

No difficulty, confusion or mistake ever existed in the present case regarding the identity of the party in whose name the suit must be brought. Section 33(b) was at all relevant times explicit and unequivocal in providing that only the employer-stevedore or its insurer may bring this action after the six-month period has passed, and we had so held in *Rodriguez, supra.*[5] Del Re and his employer are not merely different parties with the same claim. They are different parties with different claims. Moreover, allowing ratification under Rule 17 would violate 28 U.S.C. §2072 which provides that federal rules of court "shall not . . . enlarge . . . any substantive right."

The term "ratification" implies that the stevedore-employer is the party in interest for whom the present action was commenced, whereas in fact Del Re brought suit in his own name to benefit himself, not his employer or its subrogated insurer. If the suit had proceeded in his own

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[5] In addition to the district court's decision in *Rodriguez*, 456 F. Supp. 1014 (S.D.N.Y. 1978), the following other cases, in which Zimmerman and Zimmerman were counsel for the plaintiffs, had held that a longshoreman, by failing to bring suit within six months after an award, had lost his right to sue: *Panzella* v. *Skou*, 471 F. Supp. 303 (S.D.N.Y. 1979) (Werker, J.); *Francavilla* v. *Bank Line, Ltd.*, 470 F. Supp. 94 (S.D.N.Y. 1979) (Duffy, J.); *Perez* v. *Arya National Shipping Lines, Inc.*, 468 F. Supp. 799 (S.D.N.Y. 1979) (Lasker, J.); *Perez* v. *Costa Armatori, S.P.A.*, 465 F. Supp. 1211 (S.D.N.Y. 1979) (Knapp, J.).

name as the real party in interest (as he and his counsel originally intended), he would have claimed 100% of any recovery, subject to the insurer's lien for compensation paid him. A suit by the employer under the Act, on the other hand, would be of different dimensions, since 20% of any recovery over and above compensation recouped and an attorney's fee would be retained by the employer. Moreover, the fee payable to the attorney in a suit by the employer would be lower than that payable by Del Re in a suit brought in his own behalf.

To give effect to such a "ratification" would defeat the purposes of the Act as amended in 1959 and in 1972. One of these was to reduce the flood of longshoremen's litigation that had "congested courts," in which "the primary beneficiaries had been lawyers, not injured longshoremen," *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74, 83-86 (1980); Hearings, Select Subcommittee on Labor of the House Committee on Education and Labor, 92nd Cong., 2d Sess., 106 (1972). A second was to reduce the heavy expenses formerly incurred in defending these suits and thus increase the level of compensation benefits to longshoremen. The district court erroneously assumed, relying on the reasoning of *Motta*, with which we disagree, that the Act was amended solely for the protection and benefit of the longshoreman and his employer and not for that of the third-party shipowner. Congress devised a statutory scheme intended to balance the interests of all three. *Rodriguez* v. *Compass Shipping Co. Ltd.*, *supra*, —— U.S. at ——, 68 L.Ed.2d at 487-88. "One of the consequences of such an assignment [from the longshoreman to the stevedore-employer under §33(b)] is the risk that the employer will choose not to sue." *Id.*, 68 L.Ed.2d at 485-86. The

shipowner was to be benefited by the six months statutory bar in §33(b) to the extent that, once the longshoreman's right was irrevocably assigned by the statute to his stevedore-employer, not only did the stevedore's right thereafter differ in character from that of the longshoreman but the likelihood of a suit thereafter by the stevedore-employer would be greatly reduced.

Only when there is a likelihood of a recovery large enough to cover legal fees and the compensation paid would the stevedore have an incentive to sue the shipowner. Moreover, stevedores, who are hired by shipowners, are usually reluctant to jeopardize their business relations with shipowners by instituting suits on their own behalf against them. Attorneys are less willing to represent stevedore-employers in such suits, since their lawyers are limited by the statute to recovery of a "reasonable . . . fee as determined by the deputy commissioner or Board," §33(e)(1)(A), 33 U.S.C. §933(e)(1)(A), than to bring suits on behalf of longshoremen, in which the usual arrangement is a third-contingent fee. The stevedore-employer, moreover, may be unwilling (or less willing than the longshoreman) to incur costs and other expenses when the ultimate benefit to it, even if it is successful, is so limited.

Under the "ratification" theory this would be changed. Since the action is brought by the longshoreman rather than by his stevedore-employer, the latter assumes no risk at all by "ratifying" it. If the suit is unsuccessful, the longshoreman-employee, as Del Re concedes, assumes the full burden of paying the costs and expenses of the action; if, on the other hand, the suit is successful, his attorney would claim not to be bound by §33(e)'s limitation on his fee. The effect would be to reintroduce the flood of long-

shoremen's suits which Congress sought to reduce by its amendment of the Act. In addition to reopening the floodgates of wasteful litigation which Congress sought to eliminate, the ratification theory would raise new procedural issues, such as whether the Act's requirement that the attorney's fee incurred by a stevedore be approved by the deputy commissioner or board, §33(e)(1)(A), 33 U.S.C. §933(e)(1)(A), and its provision for 80%-20% division of any balance over compensation paid, §533(e), 33 U.S.C. §933(e), apply to a "ratified" suit prosecuted by a longshoreman, and whether the longshoreman or the stevedore is responsible for the fee of the attorney prosecuting the claim.

For these reasons the purported "ratification" under Rule 17(a) must be rejected. We adhere to the principle of *Rodriguez*, that if a longshoreman fails to bring suit within six months after receiving a compensation award he loses completely his right to sue the shipowner. Thereafter only the employer-stevedore or its subrogated insurer may institute such an action.

The certified question is answered in the negative. The order of the district court is reversed and the case is remanded with directions to dismiss the complaint.

Opinion of United States District Court for the Southern District of New York, dated and filed January 30, 1981, Denying, Without Prejudice to Renewal, Motion by Defendant Prudential Lines, Inc. to Dismiss the Complaint for Laches

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

80 CIV 2349 (LBS)

ANGELO DEL RE,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.,

Defendant.

OPINION FILED JANUARY 30, 1981

APPEARANCES:

For the Plaintiff:

ZIMMERMAN & ZIMMERMAN
160 Broadway
New York, New York 10038
MARTIN LASSOFF, ESQ.

For the Defendant:

JOHN F. MCHUGH, ESQ.
One World Trade Center
New York, New York 10048

Opinion of United States District Court for the Southern District of New York, dated and filed January 30, 1981, Etc.

SAND, J.

This motion by defendant Prudential Lines to dismiss the complaint on the grounds of laches is but one of a number of such motions brought before different judges of this Court arising out of its claims practice procedures adopted by defendant and Zimmerman & Zimmerman, Esqs., attorneys who represent many longshoremen in personal injury actions. Since such motions are addressed to the equitable discretion of the Court and the facts differ somewhat and since the arrangement between Prudential and Zimmerman & Zimmerman appears to have been somewhat loose and ambiguous, it is not surprising that the motions have been granted in some instances (*e.g., Secoundi* v. *Prudential Lines*, 80 Civ. 2799, Dec. 23, 1980, per Pierce, D.J.) and denied in others. (*E.g., Fernandez* v. *Prudential Lines, Inc.*, 80 Civ. 2350, Jan. 12, 1981, per Cannella, D.J.; "In short, it appears that counsel for both parties are equally culpable for the delay in pursuing this claim. To dismiss plaintiff's claim at this point would only result in harm to the plaintiff, which the Court finds particularly inequitable in light of the history of this case." p.5).

On balance, although the issue is not free from doubt, we have determined that the motion should be denied without prejudice to renewal at the conclusion of the trial.

In the exercise of its discretion, under the criteria set forth in *Public Administrator of the County of New York* v. *Angela Compania Naviera, S.A.*, 592 F.2d 58 (2d Cir. 1979) and *Larios* v. *Victory Carriers, Inc.*, 316 F.2d 62 (2d Cir. 1963) this Court must consider such matters as excuse for delay, and the extent to which the defendant made a timely investigation of the claim or actually suffers prejudice as a

result of plaintiff's alleged dilatoriness. These matters are disputed and not readily resolvable on a motion.

One alternative would be to hold a hearing on the laches defense. *Cf. Carbonaro* v. *Prudential Lines, Inc.*, 78 Civ. 4655 (LWP) (S.D.N.Y. 1980). However, we believe that the trial itself will better resolve many, if not all, of these issues and will probably be but slightly longer than such a hearing.

We recognize the dilemma in which this places defendant. The more vigorous and informed its defense at the trial, the weaker its position will be with respect to laches. Yet, if it does not vigorously defend the action, it runs the risk of a substantial judgment. Were this the usual laches motion, in which the defendant has not participated in the practices which have occasioned the delays, we would not subject the defendant to the costs of defense and to the predicament noted above before resolving the question. However, the usual nature of the dealings between the defendant and Zimmerman & Zimmerman satisfies the Court that this disposition best serves the interests of equity.

In the affidavit of Martin Lassoff of Zimmerman & Zimmerman in opposition to the motion, reference is made to an action commenced by plaintiff in the state court [presumably to avoid the statute of limitations and pursuant to a pattern established by defendant and Zimmerman & Zimmerman] and to the fact that the defendant was in default in that action, which plaintiff asserts, and defendant denies, is still viable.

Mr. Lassoff asserts:

> "The summons issuing out of the Supreme Court, New York County commenced this action on October 14, 1977 and is still in effect and is a legal and proper

commencement of an action. A further complaint in Supreme Court, New York County was served on the defendant on December 12, 1980 and defendant has failed to answer this complaint.

This action being prior in time to the Federal Court action is the action in which plaintiff chooses to proceed and will proceed at this time to take a default judgment against the defendant for its failure to appear although properly served in the Supreme Court of the State of New York."

This position would appear to be inconsistent with the conclusion of Mr. Lassoff's affidavit in which he urges that the case proceed expeditiously to trial in this Court. We will treat the quoted passage from the affidavit as being mere rhetoric. If, however, plaintiff in fact contemplates moving for a default judgment in state court, we wish to be advised of such intention in writing within fifteen (15) days from the date hereof. We will in such event place this action on the suspense docket of this Court pending resolution of the state court proceedings. If plaintiff is not going to proceed with any application in the state court proceeding, that action should be discontinued.

Motion to dismiss on the grounds of laches is denied without prejudice to renewal at the close of the trial. The motion to dismiss on the grounds of the failure to bring this action within six months of the termination of compensation payments is also denied without prejudice to renewal. The strongest allegation defendant can make in this regard is that "there is strong indication that this action" was not timely filed. Affidavit of John F. McHugh, Esq., in support of motion, ¶ 21.

Opinion of United States District Court for the Southern District of New York, dated and filed January 30, 1981, Etc.

All discovery is to be completed in ninety (90) days and a pre-trial order is then to be submitted.

So Ordered.

Dated: New York, New York
January 30, 1981

Leonard B. Sand
U.S.D.J.

Opinion of United States District Court dated June 18, 1981, and filed January 19, 1981, Denying on the Merits Renewed Motion by Defendant Prudential Lines Inc. to Dismiss Complaint for Laches

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

80 CIV 2349 (LBS)

ANGELO DEL RE,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.,

Defendant.

OPINION FILED JUNE 19, 1981

APPEARANCES:

For the Plaintiff:

ZIMMERMAN & ZIMMERMAN
160 Broadway
New York, New York 10038
MARTIN LASSOFF, ESQ.

For the Defendant:

JOHN F. MCHUGH, ESQ.
One World Trade Center
New York, New York 10048

SAND, J.

In our opinion dated January 30, 1981, we denied defendant's motion to dismiss on the grounds of failure to bring

this action within six months of termination of compensation benefits wtihout prejudice to renewal, noting that the strongest allegation that defendant could then make is that "there is strong indication that this action was not timely filed".

Defendant renews this motion stating that it has now received the plaintiff's compensation records and it appears that more than six months elapsed between the date of the final compensation payment to plaintiff and the commencement of this action (or the earlier, since dismissed, state court action). Thus, pursuant to 33 U.S.C. § 933(b), defendant asserts that the cause of action has been assigned to the employer and plaintiff cannot maintain this action since he is not the real party in interest. *Rodriguez* v. *Compass Shipping Co.* —— U.S. ——, 49 U.S.L.W. 4527 (May 18, 1981).

Plaintiff resists this motion by furnishing to the Court (Exhibit i to Affidavit of Howard Fishkin, Esq. in Opposition) a letter dated May 12, 1981 from the State Insurance Fund, the Longshoremen's Act Insurer of plaintiff's employer, ratifying plaintiff's commencement and continuance of his action, agreeing not to institute a separate action, to be bound by any judgment or release obtained or executed in this action, and asserting its lien and credit rights to any recovery in this proceeding. The State Insurance Fund is subrogated to all rights of the employer pursuant to 33 U.S.C. § 933(h).

Plaintiff cites a number of decisions in this district rendered after the Court of Appeals decision in *Rodriguez*, 617 F.2d 955 (2d Cir. 1980) but prior to the Supreme Court's affirmance, upholding the efficacy of such a ratification. *See Marullo* v. *Reederei*, 79 Civ. 3757 (Goettel, J.); *Motta* v.

Resource Shipping and Enterprises Co., 76 Civ. 5217 (Tenney, J.). *See also DeLuzio* v. *Trans-American Trailer, Inc.*, Sup.Ct. N.Y.Co., County Clerk No. 12339/80 (Altman, J.); *Sucino* v. *Akrion Shipping Co.*, Sup.Ct. N.Y.Co., County Clerk No. 13029/80 (Wallach, J.). Defendant asserts, however, that the Supreme Court's subsequent opinion, especially insofar as it rejects (at 49 U.S.L.W. 4531-4532) the reasoning of the Court of Appeals for the Fourth Circuit in *Caldwell* v. *Ogden Sea Transport, Inc.*, 618 F.2d 1037 (4th Cir. 1980), supersedes these holdings.

Our reading of the Supreme Court *Rodriguez* decision and its discussion of the *Caldwell* case, however, leads us to conclude that, although the Court specifically rejected the Fourth Circuit's view that a longshoreman had the right (after his employer failed to institute suit following the expiration of the six month period) to compel such a suit or to have his cause of action revested, it did not specifically deal with that portion of the *Caldwell* decision which held that an actual reassignment by the employer would be efficacious. *Caldwell* v. *Ogden Sea Transport, Inc.*, 618 F.2d at 1047-1048.

We conclude, therefore, that the question is not foreclosed by *Rodriguez*. We are also of the opinion that the ratification here should be effective and be accorded the same treatment as was the identically worded document from the same insurance carrier in *Motto* v. *Resource Shipping Enterprises Co., supra*, for the reasons set forth in Judge Tenney's comprehensive and persuasive opinion in that case.

Defendant also asserts that the ratification procedure attempted by State Insurance Fund is not recognized in New York and is a violation of the prohibition against transfer of personal injury claims. *See* New York General Obliga-

tions Law, § 13-101. In support of this contention, the defendant cites the decision by Judge Kassall in *Alongi* v. *McAllister Lighterage Line, Inc.*, Sup.Ct. N.Y.Co. No. 13211/79. There Judge Kassall wrote, "the ratification procedure attempted by Gulf, although expressly authorized under F.R.C.P. 17(a) is not recognized in New York. Since any transfer of a personal injury claim would be void in this state, New York GOL § 13-101, Gulf is precluded from assigning the action and must bring suit in its own name." But the matter before this Court *is* a matter which arises under F.R.C.P. 17(a). We note that the other state courts which have considered this matter have not invoked the General Obligations Law prohibition against assignment of personal injury claims nor do we believe that the procedure here is the type of personal injury claim assignment which the statute sought, for sound policy reasons, to prohibit. (We note that the Fourth Circuit in *Caldwell*, rejected a similar contention that a state prohibition against assignment of personal injury claims precluded the stevedore's assignment of the claim, reaching this conclusion without deciding whether state or federal law controls the question. *Caldwell, supra*, 618 F.2d at 1048, n.13.)

We realize that in cases of this sort, the net effect of the *Rodriguez* litigation may have been to march the troops up the hill only to march them down again. We have no basis for determining with what frequency or under what circumstances the insurer of the employer of the injured longshoreman will grant or withhold ratification. We are by no means unmindful of the paradox which results: the insurer cannot institute an action in its own name because the statute of limitations bars such a proceeding; the longshoreman cannot maintain an action in his own name because more

than six months have elapsed since receipt of the compensation award; although neither the insurer nor the longshoreman, proceeding alone, can maintain the action, the consequence of the longshoreman having brought an action within the period of the statute of limitations in conjunction with the ratification by the insurer, permits the action to be resuscitated under F.R.Civ.P. 17(a).

If the consequence of this practice is in essence, to nullify *Rodriguez*, and if that result is deemed to be undersirable or contrary to the interests of either the public, the industry, or the understandings embodied in the Longshoremen's and Harbor Workers Compensation Act, this is a matter which Congress should address as part of its pending review of the alleged deficiencies and incongruities which are present in that Act.

Motion denied.

So Ordered.

Dated: New York, New York
June 18, 1981

Leonard B. Sand
U.S.D.J.

Amended Opinion and Order of United States District Court for the Southern District of New York, Certifying Question, in Order to Enable Immediate Interlocutory Review, dated and filed July 7, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
80 CIV 2349 (LBS)

ANGELO DEL RE,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.,

Defendant.

Filed July 7, 1981

APPEARANCES:

For the Plaintiff:
ZIMMERMAN & ZIMMERMAN
160 Broadway
New York, New York 10038
MARTIN LASSOFF, ESQ.

For the Defendant:
JOHN F. MCHUGH, ESQ.
One World Trade Center
New York, New York 10048

SAND, J.

On June 18, 1981 we denied defendant's motion to dismiss, holding that the ratification of the suit by the Long-

Amended Opinion and Order of United States District Court, for the Southern District of New York, Certifying Question, in Order to Enable Immediate Interlocutory Review, dated and filed July 7, 1981

shoremen's Act Insurer of plaintiff's employer "permits the action to be resuscitated under F.R.Civ.P. 17(a)." Opinion, p. 4. Defendant has asked that we enter an order pursuant to 28 U.S.C. § 1292(b) certifying the question to enable immediate interlocutory review. Plaintiff opposes this application but states no reasons for the adoption of this position.

We are indeed of the opinion that the order embodied in our opinion of June 18, 1981 denying defendant's motion to dismiss involves a controlling question of law as to which there is substantial ground for difference of opinion, *i.e.*, whether a longshoreman's personal injury claim commenced within the period of the statute of limitations but more than six months after receipt of compensation benefits may be maintained pursuant to F.R. Civ.P. 17(a) where the Longshoremen's Act Insurer of plaintiff's employer (as to whom the statute of limitations would bar an independent action ratifies plaintiff's suit. This Court is further of the opinion that an immediate appeal from this order may materially advance the ultimate determination of the litigation.

Defendant's application to have the question certified is granted and our opinion of June 18, 1981 is hereby amended to include the aforesaid findings.

So Ordered.

Dated: New York, New York
July 7, 1981

Leonard B. Sand
U.S.D.J.

Order of Court of Appeals for Second Circuit, dated and filed August 11, 1981, Granting Leave to Appeal

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

81-8111

ANGELO DEL RE,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.,

Defendant.

Filed August 11, 1981

IT IS HEREBY ORDERED that motion dated July 17, 1981 for leave to appeal be and it hereby is granted.

Dated: 8/11/81

ELLSWORTH A. VAN GRAAFEILAND
U.S.C.J.

AMALYA L. KEARSE
U.S.C.J.

HOWARD J. MARKEY
Ch. J., USCC & PA

Order of U.S. Department of Labor Compensation Board, dated February 22, 1977 and filed February 25, 1977

COMPENSATION ORDER

AWARD OF COMPENSATION

CASE No. 2-39033

ACT: LHWCA

ANGELO DEL RE,

Claimant,

v.

NORTHEAST STEVEDORING,

Employer,

THE STATE INSURANCE FUND,

Insurance Carrier.

Pursuant to agreement and stipulation by and between the interested parties, and such further investigation in the above entitled claim having been made as is considered necessary, and no hearing having been applied for by any party in interest, or considered necessary by the Deputy Commissioner, the Deputy Commissioner makes the following:

FINDINGS OF FACT

1. That on March 7, 1975, the claimant above-named was in the employ of the employer above-named at Pier 39, Brooklyn, New York in the 2nd Compensation District,

Order of U.S. Department of Labor Compensation Board, dated February 22, 1977 and filed February 25, 1977

established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended and extended, that the liability of the employer for compensation under the said Act was insured by the State Insurance Fund.

2. That on said day the claimant, while performing service as a Longshore worker for the employer, sustained an injury to the legs and right arm and such injury comes within the purview of the above Act.

3. The requirements of notice of the injury to the employer have been met.

4. The employer furnished the claimant with medical treatment, etc., in accordance with the provisions of Section 7 of the said Act.

5. The average weekly wage of the claimant at the time of injury was $141.83;

As a result of the injury the claimant was wholly disabled from March 8, 1975, to September 29, 1975, inclusive for which he is entitled to compensation for temporary total disability for 29-3/7 weeks, at $94.55 per week, in the amount of $2,782.47.

As a further result of the injury the claimant has a permanent partial disability equivalent to 17½ percent loss of use of the right arm 13½ percent loss of use of the right leg and 8½ percent loss of use of the left leg, for which he is entitled to compensation for 54.6 weeks (17½ percent of 312 weeks), 38.88 weeks (13½ percent

Order of U.S. Department of Labor Compensation Board, dated February 22, 1977 and filed February 25, 1977

of 288 weeks), and 24.48 weeks (8½ percent of 288 weeks) at $94.55 per week, in the amount of $11,153.11.

Accrued compensation for temporary total, and permanent partial disability amounts to $13,935.58. The employer and the insurance carrier have paid $3,090.00 to the claimant as compensation, ($307.53 of which was an overpayment which carrier has agreed to waive).

Upon the foregoing findings of fact the Deputy Commissioner makes the following AWARD.

The employer, the Northeast Stevedoring, and the insurance carrier, the State Insurance Fund shall pay to the claimant compensation as follows: For temporary total disability from March 8, 1975, to September 29, 1975, inclusive 29-3/7 weeks at $94.55 per week, and permanent partial disability 117.96 weeks at $94.55 per week; a total of $13,935.58.

The employer and the insurance carrier having paid $2,782.47 excluding $307.53 overpaid, to the claimant as compensation shall pay forthwith $11,153.11, whereupon

AUDIT & REVIEW DIVISION

	APPROVED BY
$14,243.11	2/25/77

(Waived)

the file of Angelo Del Re will be CLOSED, subject to the limitations of the Act.

A fee of $710.00, to include medical expenses, is approved in favor of John Gargano, Representative, for services rendered on behalf of the claimant, and is not a lien on the award.

Order of U.S. Department of Labor Compensation Board, dated February 23, 1977 and filed February 25, 1977

Given under my hand at 1515 Broadway New York, N.Y. this 25th day of February, 1977.

/s/ ANTHONY F. CAMPO
Anthony F. Campo
Deputy Commissioner
2nd Compensation District

Carrier's No.: 9461 233-45
Mailed 2/25/77

/s/ JOHN G. PROVENZA
Claims Examiner

CERTIFICATE OF FILING AND SERVICE OF AFORESAID ORDER OF U.S. DEPARTMENT OF LABOR COMPENSATION BOARD

I certify that on February 25, 1977 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, 2nd Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Angelo Del Re
Claimant

John Gargano
Representative

The State Insurance Fund
Insurance Carrier or Employer (if self-insured)

A copy was also mailed by regular mail to the following: Director, Office of Workers' Compensation Programs, (LHWCA), U.S. Department of Labor, Washington, D.C. 20211

/s/ ANTHONY F. CAMPO
Anthony F. Campo
Deputy Commissioner
2nd Compensation District
U.S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs

If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 percent thereof. The additional amount shall be paid at the same time as, but in addition to, such compensation.

The date compensation is due is the date the Deputy Commissioner files the decision or order in his office.

Judgment of the Court of Appeals for the Second Circuit (dated and filed January 21, 1982) Sought to Be Reviewed

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of January one thousand nine hundred and eighty-two

Present:

HON. J. EDWARD LUMBARD
HON. WALTER R. MANSFIELD
HON. JON O. NEWMAN

Circuit Judges,

Filed January 21, 1982

#81-7591

ANGELO DEL RE,

Plaintiff-Appellee,

v.

PRUDENTIAL LINES, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Judgment of the Court of Appeals for the Second Circuit, dated and filed January 21, 1982 Sought to Be Reviewed

Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

A Daniel Fusaro, Clerk

/s/ Edward J. Guardaro
Edward J. Guardaro
Deputy Clerk

Summons Filed in United States District Court for the Southern District of New York on April 28, 1980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

J. SAND
80 CIV 2349

ANGELO DEL RE,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.,

Defendant.

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Zimmerman & Zimmerman plaintiff's attorney, whose address 160 Broadway, New York City, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in this complaint.

RAYMOND F. BURGHARDT
Clerk of Court.

J. McMAHON
Deputy Clerk.

[Seal of Court]

Date: Apr 28 1980

Complaint, filed April 28, 1980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

J. SAND
80 CIV 2349

ANGELO DEL RE,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.,

Defendant.

PLAINTIFF DEMANDS A TRIAL BY JURY

PLAINTIFF, complaining of defendant above named, by ZIMMERMAN & ZIMMERMAN, his attorneys, respectfully alleges:

I. Upon information and belief, defendant is a domestic corporation.

II. Upon information and belief, defendant has its principal place of business in the Borough of Manhattan, City of New York.

III. Plaintiff is a non-citizen.

IV. That the matter in controversy, exclusive of interest and costs, exceeds the sum of TEN THOUSAND ($10,000.00) DOLLARS.

V. Upon information and belief, that at all the times herein mentioned, and prior thereto, defendant was the owner of the vessel the SS SANTA BARBARA.

Complaint, filed April 28, 1980

VI. Upon information and belief, that at all the times herein mentioned, and prior thereto, defendant manned said vessels and its master, officers and crew were on board said vessel and in possession of same.

VII. Upon information and belief, that at all the times herein mentioned, and prior thereto, defendant managed, operated, maintained and controlled said vessel.

VIII. Upon information and belief, that at all the times herein mentioned, and prior thereto, said SS SANTA BARBARA was docked at the 39th Street Terminal, Brooklyn, New York, and stevedoring work was being performed thereon.

IX. Upon information and belief, that at all the times herein mentioned, said stevedoring work on board said vessel was being performed by NORTHEAST STEVEDORING Co. INC. pursuant to agreement with defendant or its agents.

X. Upon information and belief, that at all the times herein mentioned, and prior thereto, said stevedoring work on board said vessel, was being performed under the general supervision and direction of defendant, his agents, employees, the master, officers and crew of said vessel.

XI. That at all the times herein mentioned, and prior thereto, Plaintiff was employed as a longshoreman by said NORTHEAST STEVEDORING CORP., INC., and in the course of the performance of his duties was lawfully at the string piece of said vessel next to hatch No. 3 thereof.

XII. Upon information and belief, that at all the times herein mentioned, and prior thereto, said hatch No. 3 of said vessel, and the winches, drums, brakes, gears, falls, booms and appurtenances of said hatch No. 3 were a part of said vessel, and were maintained by the defendant.

Complaint, filed April 28, 1980

XIII. Upon information and belief, that at all the times herein mentioned, and prior thereto, said hatch No. 3 of said vessel and the cargo thereat were a part of said vessel, and were maintained, supplied and provided by defendant to longshoremen for use in connection with the performance of their stevedoring work on board said vessel.

XIV. That on or about the 7th day of March, 1975, while Plaintiff was lawfully on said vessel, when he was caused to be pinned and to sustain severe personal injuries.

XV. That said accident was caused solely by reason of the carelessness and negligence on the part of the defendant, its agents, employees, the master, officers and crew of said vessel in that they failed to supply Plaintiff with a safe place to work; in that they failed to supply suitable, safe, proper and adequate winches, their drums, brakes, gears and appurtenances, booms; in that they failed to warn Plaintiff thereof; in that they failed to remedy or repair said conditions; in that they failed to avoid said accident although it was foreseeable; in that they permitted and allowed said vessel, to be, become and remain unsafe, and unseaworthy and so maintained same; in that they breached the provisions of the Joint Maritime Safety Code of the Port of New York; in that they breached strict liability without tort; in that they failed to avoid said accident although they had reasonable opportunity to do so; and in that they were careless and negligent in other respects.

XVI. That as a result thereof, Plaintiff sustained certain severe personal injuries, both internal and external, to diverse parts of his arms, head, legs and body, and he was made, sick, sore, lame and disabled and suffered a

severe shock to his nervous system, and Plaintiff believes that some of the injuries he sustained may remain permanent.

XVII. That Plaintiff was compelled to expend diverse sums of money for medical aid and attention in the endeavor to cure himself of the injuries he sustained, and may in the future be compelled to expend further sums of money for such purpose, and was, and may in the future be unable to pursue his usual vocation, to his damage.

XVIII. That by reason of the premises, Plaintiff has sustained damage in the sum of Three Hundred Thousand ($300,000.00) Dollars, besides the costs and disbursements of this action.

WHEREFORE, Plaintiff demands judgment against the defendant, for the sum of Three Hundred Thousand ($300,000.00) Dollars, besides the costs and disbursements of this action.

ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff
160 Broadway
Borough of Manhattan
City of New York 10038

Answer to Complaint, filed June 6, 1980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

80 CIV 2349—J. SAND

ANGELO DEL RE,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.,

Defendant.

Defendant, PRUDENTIAL LINES, INC., as and for its answer to the complaint herein:

1. Admits the allegations contained in paragraph "II", "V", "VI", "VII", "VIII", "IX", "XI", "XII", and "XIII".

2. Does not have information sufficient to form a belief as to the allegations of paragraphs "III", "IV", "XIV" and "XVII".

3. Denies the allegations contained in paragraph "I" except admits that it is a corporation duly formed under and existing by virtue of the laws of the State of Delaware.

4. Denies the allegations contained in paragraph "X", "XV", "XVI" and "XVIII".

As and for a First Complete Affirmative Defense

5. Plaintiff's complaint fails to state a cause of action upon which relief can be granted defendant, PRUDENTIAL LINES, INC.

Answer to Complaint, filed June 6, 1980

As and for a Second Complete Affirmative Defense

6. Plaintiff's alleged injury is claimed to have taken place on March 7, 1975.

7. No summons was served in this action until May 1, 1980.

8. More than three years have elapsed between the date of Plaintiff's alleged injury and the commencement of this action.

9. Defendant has been severely prejudiced as a result of Plaintiff's unreasonable delay in commencing this action.

10. This action is therefore time barred pursuant to the doctrine of laches.

As and for a Third Complete Affirmative Defense

11. Plaintiff's injury, if any, was the sole result of his own negligence, or of the negligence of his employer Northeast Stevedoring Co., Inc., in failing to properly supervise plaintiff.

12. There was no negligence on the part of defendant, Prudential Lines, Inc.

Wherefore, Defendant requests judgment in its favor, dismissing the complaint, and for the costs and disbursements of this action.

Answer to Complaint, filed June 6, 1980

Dated: New York, New York
June 4, 1980

JOHN F. McHUGH
Attorney for Defendant
Prudential Lines, Inc.
One World Trade Center
New York, New York 10048

To: ZIMMERMAN AND ZIMMERMAN
Attorneys for Plaintiff
160 Broadway
New York, New York 10038

Affidavit filed by Martin Lassoff, on Behalf of Plaintiff, on January 6, 1981, in Opposition to Motion filed by Defendant on December 16, 1980, to Dismiss Complaint for Laches*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

80 Civil 2349 (LBS)

ANGELO DEL RE,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.,

Defendant.

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

MARTIN LASSOFF, being duly sworn, deposes and says:

I am an attorney duly admitted to practice before this Court and associated with the firm of ZIMMERMAN & ZIMMERMAN, attorneys for the plaintiff herein and as such am fully familiar with all the facts and circumstances involved in this action as well as all other actions with Prudential-Grace Lines handled by Zimmerman & Zimmerman.

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* Defendant's notice of motion and supporting papers were not included in the Joint Appendix filed with the Court of Appeals on defendant's appeal to that Court, which resulted in the judgment sought to be reviewed in this Court. Defendant's motion was later denied without prejudice to renewal.

Affidavit filed by Martin Lassoff, on Behalf of Plaintiff in Opposition to Motion

I make this affidavit in opposition to defendant's motion for an Order dismissing this action based on laches and plaintiff's failure to timely commence an action under the Longshoremen's and Harbor Worker's Act, making the real party in interest the stevedoring company.

Plaintiff was injured on March 7th, 1975 on board defendant's vessel, the SS SANTA BARBARA, when due to defendant's defective winches, he was caused to be crushed by a draft that fell from said winches.

This action was commenced by service of a summons on defendant on October 14, 1977, said summons bearing jurisdiction of Supreme Court of the State of New York, County of New York.

This action was Zimmerman & Zimmerman's and Prudential Lines' usual way of commencing negotiations and the summons was meant to alert Prudential to bring its file up to date, do its investigation if none had been conducted prior, and discuss settlement of this case.

At the time of the commencement of this action, defendant's Claim Manager, (See deposition of George Friedheim) was in charge of this case.

As can be seen from the deposition of George Friedheim, (complete copy of deposition attached), it was Mr. Friedheim's practice upon receipt of the summons if he had not already ordered an investigation into the facts of the accident, to order an investigation to be made by either Prudential Lines, Inc. or by an independent investigating service, General Claims Service and this was done in this matter. General Claims Service file in this matter was subpoenaed and that subpoena was returnable on August 29, 1980 before this Court, before Judge Pierce, when defendant made a motion to quash the subpoena which

Affidavit filed by Martin Lassoff, on Behalf of Plaintiff in Opposition to Motion

dealt with twenty-three files commenced in the Federal Court by Zimmerman & Zimmerman with Prudential Lines, and that motion has not as yet been determined. However, in other cases where this motion has been made, defendant has conceded that an investigation had been conducted but refused to reveal what its investigation unfolded.

It is to be respectfully noted that defendant herein makes no mention of its investigation in this matter even though it had one and makes no factual statements whatsoever with regard to any of its claims as to its defense of laches. Attached hereto and made a part hereof are photostatic copies of letters supplied to Zimmerman & Zimmerman by Mr. John J. McHugh, General Counsel with Prudential Lines wherein it is clear that at the request of Prudential Lines' Claims Manager (Exhibit I, being a letter from Mr. Friedheim, Prudential's Claim Manager to Zimmerman & Zimmerman) that Prudential Lines, Inc. requested in writing an unlimited extension of time to answer in these cases and the second letter showing clearly that Zimmerman & Zimmerman gave Prudential Lines an unlimited time to answer in the exact language requested by Mr. Friedheim.

At no time after the service of the summons in this action, did Zimmerman & Zimmerman, receive any request for information since it is quite clear that Prudential Lines, Inc. had the ability to obtain whatever necessary information it required from either the stevedoring company by whom Mr. Del Re was employed, Northeast Stevedoring Company, Inc., or its insurance company, the State Insurance Fund, by either requesting copies of the medical examinations and disability or subpoenaing said information from the aforesaid corporations and insurance com-

panies with whom Prudential Lines had substantial business contacts as this was their regular stevedoring company at their regular pier.

These cases were discussed quite frequently. Mr. Friedheim, Claims Manager of Prudential Lines, had more information from both the stevedoring company and its insurance company and from its investigation than even plaintiff's attorney had.

Deponent attempted to discuss this case with a Mr. Radu Herescu, an unlicensed attorney in the claims department of Prudential Lines, but was unable to do so in 1980. Claims Manager of Prudential Lines, Mr. Friedheim, left this company in 1978 and until the advent of Mr. Herescu, various minor functionaries at Prudential Lines handled claims for Prudential for a short period of time and then left the company. Since the attempt to discuss the case after a complaint had been served on defendant on July 6th, 1979 and plaintiff had received a rejection of that complaint on August 7th, 1979, which rejection in itself was untimely, deponent determined that the only way to get this defendant to appear even though the state court action was a viable cause of action without the necessity of taking default judgments, was to commence an action in the Federal Court.

A complaint was filed on April 28th, 1980 and this case was assigned to Your Honor. Defendant once again failed to answer the complaint until June 6th, 1980 and once again was in default. Deponent's office does not believe that any fair system of disposing of claims exists except for litigation of claims and has consistently attempted to avoid taking the default judgment against defendants where it believes there are parties who should respond to legal process in legal ways.

Affidavit filed by Martin Lassoff, on Behalf of Plaintiff in Opposition to Motion

The summons issuing out of the Supreme Court, New York County commenced this action on October 14, 1977 and is still in effect and is a legal and proper commencement of an action. A further complaint in Supreme Court, New York County was served on the defendant on December 12, 1980 and defendant has failed to answer this complaint.

This action being prior in time to the Federal Court action is the action in which plaintiff chooses to proceed and will proceed at this time to take a default judgment against the defendant for its failure to appear although properly served in the Supreme Court of the State of New York.

The first of these motions made by Prudential Lines, Inc. in connection with litigation in the Federal Court was heard before Judge Goettel in August of 1980 at which time Judge Goettel set his case which was the case of *Heliodoro Hernandez* v. *Prudential Lines,* down for an evidentiary hearing commencing after January 4th of 1980 so that each of the parties would have an opportunity to take the deposition of whomever it chose to be a witness in this case. Defendant has not moved to depose anybody. Plaintiff has already held depositions of Mr. George Friedheim and has noticed the deposition of Mr. Spiros Skouras, principal owner of Prudential Lines, to ascertain certain facts which have been raised in defendant's moving papers.

This deposition was noticed in the *Hernandez* case and Mr. Skouras was supposed to appear on December 22nd at the office of Zimmerman & Zimmerman for his deposition to be conducted. On Friday, December 19th, deponent received a telephone call from Mr. Radu Herescu stating that Mr. Skouras would be out of time and would not

Affidavit filed by Martin Lassoff, on Behalf of Plaintiff in Opposition to Motion

appear. Deponent immediately informed Mr. Herescu that there was a time limit on these discovery proceedings set by Judge Goettel and inquired when Mr. Skouras would be produced. At this point Mr. Herescu changed what he had said before and said that the real reason for the request for an adjournment was that defendant was going to move for a Protective Order so that Mr. Skouras would not have to testify. Deponent received Prudential's Motion for a Protective Order on December 22nd, 1980 and cross-moved for an Order Striking Defendant's Answer for failure to produce the necessary witness.

The reason for taking the testimony of Mr. Skouras was that defendant claims it has been prejudiced because it sold its ship to a company known as Delta Steamship Corp. Interestingly enough, Delta Steamship Corp. now occupies the quarters in One World Trade Center, previously occupied by Prudential Lines. Prudential Lines has moved its offices one floor up from the 36th to 37th Floor while Delta operates its old offices on the 36th Floor at that Building. It is deponent's firm conviction that Mr. Skouras owns a considerable portion and has considerable interests with Delta Steamship Company which either purchased or leased the vessel in question. It is further deponent's position that the officers of this vessel and indeed some of the crew members are still employed by Prudential Lines and it is further deponent's position that any or all necessary witnesses are readily available to defendant if it chooses to produce them.

On the making of this motion, defendant has not issued one single statement that it has attempted to locate or not locate any officer or crew member who was on board the vessel when this accident occurred. It merely makes a

statement that it would be difficult possibly to locate these people. It is respectfully submitted that this is not the type of evidence to be considered on a motion to dismiss for laches. Defendant has the responsibility where an action was timely commenced, in fact, before the three-year statute of limitations, to show that it has been prejudiced in fact, and not by inference.

Defendant further states that plaintiff worked under the exclusive control and supervision of Northeast Stevedoring Company, its contract stevedore and it seems hardly likely that its contract stevedore would not furnish information it requested. Defendant refers to an investigation which says that no ship's gear was involved. Since plaintiff was injured while on the stringpiece by a descending draft of cargo from defendant's winches, this is absurd on its face. Defendant further states that it never received any information of the stevedoring company. It nowhere states that it requested any information from the stevedoring company. It never requested any information from plaintiff's office.

Defendant further states that the real party in interest should be the stevedoring company or its insurance company since the right to the cause of action passed to them. Once again it submits no proof of this contention and this is not the case. This action was commenced timely in the Supreme Court, New York County and the right of action is the plaintiff's.

The Court may ask why these actions in claim with Prudential Lines were not disposed of expeditiously. The answer to that is simple. Prudential Lines has for many years had severe problems with cash flow and has been very slow in handling these claims and even after settling

Affidavit filed by Martin Lassoff, on Behalf of Plaintiff in Opposition to Motion

these claims, it has been necessary for deponent's office to move for judgment on the settlements when these settled cases were not paid within six to eighteen months of the settlement. This is further corroborated by the deposition of George Friedheim, Claims Manager, to the effect that he did not have sufficient money available to settle these claims and had to do so slowly and even when he settled them, it would take time to obtain settlement funds. This condition has worstened since Mr. Friedheim left the company and as can be seen from the nine cases where motions for judgment were made, copies of which are attached, obtaining payment in any manner from this defendant has always been most difficult.

Also, attached hereto and made a part hereof, is a statement taken of Mr. Friedheim prior to the taking of his deposition and it is interesting to note that at all times, defendant fully knew of its practices in requesting indefinite extensions of time because of even its inability to pay and procure adequate clerical help let alone the settling and paying of claims and asked for and received a substantial benefit from Zimmerman & Zimmerman, and now attempts to repudiate the benefit that it received and take any moral position stating that what it requested should not bind this defendant.

The "doctrine of laches" requires the party moving for relief on the equitable defense of laches to come forward with clean hands. Defendant, having requested an unlimited extension of time to handle these cases in claim and having never requested that this case go forward or appeared in the action, and having accepted the substantial benefit given it by having an unlimited extension of time, now seeks to repudiate its express request and to take ad-

Affidavit filed by Martin Lassoff, on Behalf of Plaintiff in Opposition to Motion

vantage of a condition caused by defendant. This certainly shows a clear lack of good faith on the part of the defendant. If not, an unconscionable and unscrupulous attempt to obviate its word and to unfairly handle a situation.

As can further be seen from the deposition of Mr. George Friedheim, that it was never contemplated and never in fact allowed to occur, that any cause of action which was properly started or commenced by the service of a summons would ever have a defense of laches or statute of limitations or any defense other than that which existed at the time of the service of the State Court summons.

As can further be seen from the deposition of Mr. George Friedheim, he prepared a list from management of all pending claims each and every year and management was always aware of the pendency of each and every claim and if management wished to proceed to litigation, it had at the same option of Zimmerman & Zimmerman, that is, to put in a Notice of Appearance and notify Zimmerman & Zimmerman that the case was rejected in claim and defendant wished to litigate. As a matter of fact, in the past when this occurred, Mr. Friedheim would send his cases to the firm of Lilly, Sullivan & Purcell and Lilly, Sullivan & Purcell would file a Notice of Appearance and Zimmerman & Zimmerman would file a complaint.

Deponent has read the moving affidavit in support of defendant's motion by Mr. John F. McHugh and upon close examination, deponent cannot find one single fact listed in Mr. McHugh's affidavit to show that defendant has been or would be prejudiced and in fact, not one single attempt to obtain a fact has been shown by Mr. McHugh from either the attorneys for the plaintiff, the stevedoring company, its insurance company, its own officers and crew members or from Delta Steamship Company.

Affidavit filed by Martin Lassoff, on Behalf of Plaintiff in Opposition to Motion

To permit a defense of laches based not even on inferences but on hypotheses not warranted in any way, shape or form by evidence, would be to pervert justice.

WHEREFORE, it is respectfully requested that defendant's motion be in all respects denied and it is further respectfully requested that defendant proceed to place itself in a position to try this case expeditiously so that whatever rights the party may have may be determined before this Court.

/s/ MARTIN LASSOFF
Martin Lassoff

Sworn to before me this
29th day of December, 1980.

LYDIA MEBO
Notary Public, State of New York
No. 24-4642797
Qualified in Kings County
Commission Expires March 30, 1982

Affidavit of John F. McHugh, on Behalf of Defendants, filed on January 16, 1981, in Reply to Affidavit of Martin Lassoff, filed in Opposition to Defendant's Motion to Dismiss for Laches

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK
80 Civ. 2349 (LBS)

ANGELO DEL RE,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.,

Defendant.

REPLY AFFIDAVIT

JOHN F. MCHUGH, being duly sworn, deposes and says:

1. I am the General Counsel of the Defendant Prudential Lines, Inc., the attorney of record for the Defendant in this case and an attorney duly admitted to practice before this Court.

2. As an attorney and as an officer of the Defendant I have access to the records of the Defendant and make this reply affidavit in support of Defendant's motion to dismiss due to laches and as plaintiff is not a proper party here pursuant to 33 USC 933(b), based upon all of the pleading herein, the records of this corporation and upon the affidavits submitted on this motion.

3. In reply to Defendant's motion to dismiss, the Plaintiff's counsel makes numerous allegations concerning the

Affidavit of John F. McHugh, on Behalf of Defendants, in Reply to Affidavit of Martin Lassoff

facts all but one of which are unfounded and/or based on false assumptions. Defendant's assertions on this motion is that the Plaintiff's counsel's conduct in this case is indicative of a pattern and practice of neglect of the interests of his clients, of which this case is but one example.

4. As his only serious defense to this motion, Plaintiff's counsel raises an agreement evidenced by a letter addressed by him to the Defendant on October 15, 1974. Although the letter-agreement is very clear as to its content, plaintiff's counsel opposing affidavit asserts without any support of evidence or rational interpretation of the agreement that it precludes defendant from raising the defense of laches and that pursuant to this agreement the parties would have whatever rights they would have had at the time the summons was originally served. It is respectfully submitted that the letter-agreement does not make any express or implied reference to any waiver of any defense or to the rights of the parties except that it provides that: "This stipulation may be withdrawn by plaintiff at any time with reference to any specific case as to which we will notify you in writing."

5. Plaintiff's counsel efforts to expand the terms of this agreement to include a waiver of the Defendant's right to assert laches cannot succeed in the face of the Parol Evidence rule. The agreement does not waive any of the defendant's defenses by its terms and these terms cannot be expanded even by the Deposition of Mr. Friedheim submitted by the Plaintiff in opposition to this motion. Defendant in asserting the defenses of laches and that the plaintiff lost his right to action pursuant to 33 U.S.C.A. §933(b), is clearly not in violation of the agreement. Further the agreement by its terms gives Plaintiffs counsel

the continuing right to move any case, a right he never chose to exercise.

6. Plaintiff's counsel alleges various excuses for protracted inaction, one of which being that he has let the claim lie dormant in his files for years, allegedly due to his concern for Defendant's financial condition. In support of his contention as to the Defendant's poor payment record he affixes motions to enforce settlements made between August and October, 1980. It is respectfully submitted that these motions are irrelevant and do not support any contention that the defendant was either unwilling or unable to settle the claims filed by Plaintiff's counsel, including the instant one, in a reasonably timely fashion for a period beginning in 1973 and continuing today. It is worthy to note that during that period of time, defendant paid approximately 120 claims for a total amount of over $700,000 to various claimants represented by plaintiff's attorneys. Further, Defendant's financial condition is not an appropriate excuse for Plaintiff's failure to press this claim. Further, Plaintiff's contention that defendant's financial condition is relevant to the issue of laches, and his excuse that such financial condition prevented him from prosecuting his claim, were rejected by this Court by denying Plaintiff's subpoena to take the deposition of the President of defendant's company, Mr. Spyros Skouras, and to subpoena its records. Defendant's motion for a protective order with reference to the above subpoena was granted by the Honorable Judge Goettel on December 31, 1980.

7. Further plaintiff's counsel alleges that George Friedheim's deposition clearly indicates that under the agreement, defendant could not make a motion for laches or for failure to prosecute. It is respectfully submitted that no

Affidavit of John F. McHugh, on Behalf of Defendants, in Reply to Affidavit of Martin Lassoff

such allegation by Mr. Friedheim was made during his deposition or in his affidavit attached to plaintiff's counsel opposing affidavit. To the contrary, George Friedheim states in his Affidavit that *"if an action was started we had an agreement with the attorney representing the injured party that either of us would demand to litigate the case and not to continue in claim"*. (See Affidavit of George Friedheim attached to plaintiff's affidavit in opposition, page 1, lines 8-11).

8. Plaintiff's counsel further alleges that prior to the commencement of this action he did discuss this case twice with Mr. Radu Herescu from defendant's office but was not successful in obtaining a resolution of this matter. It is respectfully submitted that the record indicates that no such attempts to discuss settlement of this case were made by plaintiff's attorneys and that no such settlement discussions with reference to this case were held. It is relevant to note that plaintiff's attorney attempt to discuss settlements was made through a letter dated October 29, 1979 addressed to our office listing 112 cases to be discussed at once on November 13, 1979. Even on this letter, plaintiff's name does not appear. (See Exhibit A attached hereto). There is no doubt that plaintiff's counsel did not expect seriously to discuss such a huge list of cases which was totally unrealistic. This discussion was a general discussion of the Laches issues as it related to numerous cases without any specific reference to the instant case, and cannot excuse in any way plaintiff's unreasonable delay.

9. Mr. Friedheim whose testimony is heavily relied upon by Plaintiff, indicated clearly that Plaintiff's counsel would periodically send him huge lists of cases to be discussed

for possible settlement but that few of these cases would ever be reached even when a settlement conference did occur. (See: *Deposition of George Friedheim*, page 28, lines 7-14 attached to Plaintiff's Affidavit in Opposition to the Motion). Thus, it is apparent that the mere listing of a matter on an unrealistically long agenda for a settlement conference constitutes no serious effort to move the case and certainly cannot excuse Plaintiff's protracted lack of serious action on this claim. (See Ex. A).

10. Plaintiff's counsel alleges as an excuse for his protracted delay in prosecuting his client's claim the fact that this delay conveyed a substantial benefit to defendant because PRUDENTIAL LINES did not have sufficient clerical staff to handle the claims and/or funds to pay settlements. It is respectfully submitted that plaintiff's counsel should have been concerned with his client's interests and should have acted solely on his client behalf disregarding the defendant's interests and that such excuses are absurd and totally without merit.

11. The letter agreement cited earlier, did not relieve the Plaintiff's attorney from either the obligation to press his client's claim reasonably promptly or from his obligation to the defendant not to delay prosecution of the claim for an unreasonable period of time. It clearly had no effect on this case, where a complaint was not served by Plaintiff's attorney until long after the expiration of the analogous Statute of Limitations and thus the period of laches especially in light of plaintiff's repeated refusal to provide defendant with allegations of liability and claim damage and information in support of it.

12. Plaintiff's counsel opposing affidavit alleges that the instant action is not barred by laches. It is submitted that

since plaintiff's claimed accident occurred in 1975, after the effective date of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, he has claims based exclusively upon negligence. New York CPLR §214(5) establishes a three-year statute of limitations for personal injury actions which is applicable to the instant case. Therefore the state statute of limitations which is applicable to the instant case so as to indicate the presence or absence of prejudice and inexcusable delay, had run long before plaintiff commenced the instant action.

13. Plaintiff's counsel indicates that this motion raises questions of morality and ethics which rise above law. He is wrong as the law should, and hopefully does, incorporate such principles and they include an attorney's obligation to prosecute the legitimate claims of his clients in a reasonably prompt fashion. The law and fundamental fairness includes the doctrine of finality embodied in Laches which holds that no defendant should be called upon to answer a claim so many years after the event that defense is unfairly difficult or onerous.

14. Plaintiff's counsel's opposing affidavit alleges without any support of evidence that the defendant had an investigation in this matter. It is respectfully submitted that defendant had no investigation whatsoever in this case because plaintiff did not provide defendant with any relevant information as to the occurrence of the accident and any injury to the plaintiff. Therefore, the defendant was prejudiced by the fact that it did not have an opportunity to investigate the case, and any attempt to make such an investigation at this time would be fruitless due to the passage of time.

15. Further plaintiff's counsel alleges that this motion to dismiss based on laches could not be made in the New

Affidavit of John F. McHugh, on Behalf of Defendants, in Reply to Affidavit of Martin Lassoff

York State Supreme Court because there was no abandonment of the action by the plaintiff and no default in appearance by defendant. It is respectfully submitted that a State Supreme Court summons was served on October 14, 1977, that defendant never appeared in this action, and that plaintiff failed to take any step to prosecute its State Supreme Court action and failed to take proceedings for the entry of judgment within one year from defendant's default. Therefore the State Supreme Court action was abandoned by operation of law and should be dismissed pursuant to New York Civil Practice Law and Rules §3215(C).

16. Plaintiff's attorney further alleges that the time for a claim of laches runs from the date of commencement of the first action which was October 14, 1977. It is respectfully submitted that while the service of his State court summons was timely made and this constitutes commencement of this action it is plaintiff's failure to prosecute by following up with a complaint over five years after the alleged accident and three years after the service of the summons, that constitutes a bar to his recovery. Laches in this sense is equivalent to failure to prosecute, for which dismissal is proper.

17. Plaintiff's counsel further alleges that defendant was not prejudiced by his delay in prosecuting this claim because Mr. Friedheim "had more information from both the stevedoring company and its insurance company and from its investigation than even plaintiff's attorney had." No support for that statement can be found in Mr. Friedheim's testimony. It is submitted that defendant never received any compensation record or medical records from either the stevedoring company or its insurance carrier.

Affidavit of John F. McHugh, on Behalf of Defendants, in Reply to Affidavit of Martin Lassoff

18. It is respectfully submitted that plaintiff has not submitted an adequate excuse for his delay. His excuse, such as it is, is certainly inadequate in the face of defendant's clearly demonstrated prejudice.

19. Plaintiff is also not a proper party to pursue this action as stated in our initial motion papers, as the plaintiff was an employee of a stevedoring company, NORTHEAST STEVEDORING COMPANY, INC., and is seeking recovery from the owner of the vessel, by commencing the instant action on April 28, 1980. Although defendant was not provided with the requested information and/or authorization to examine plaintiff's compensation records, there is a strong indication that this action was filed several years after termination of compensation payments made to plaintiff by his employer. It is respectfully submitted that under the Longshoreman's and Harbor Workers' Act, acceptance of a compensation award by an employee operates as an assignment to the employer or its insurance carrier of all rights of the employee to recover damages against a third-party unless the employee commences suit against the third-party within six months after award.

20. The service of a summons without notice on October 1, 1977 in the State Supreme Court, predating the compensation awards, has no bearing on the instant action. The fact that plaintiff neglected for over five years to take any serious action to press the State Supreme Court action is a clear abandonment of the action and requires its dismissal for failure to prosecute and laches. Further pursuant to Rule 3 of the Federal Rules of Civil Procedure *"A civil action is commended by filing a complaint with the court". No complaint was filed in this case until April 28, 1980.* It is respectfully submitted that plaintiff cannot

Affidavit of John F. McHugh, on Behalf of Defendants, in Reply to Affidavit of Martin Lassoff

prosecute the instant case relying on an abandoned action in the State Supreme Court barred by laches for failure to prosecute and that the provisions of the Federal Longshoreman's and Harbor Workers' Compensation Act, 33 USCA §933(b) should be applied to the instant action which will bar plaintiff's claim.

WHEREFORE, your deponent respectfully requests that this motion be granted dismissing this complaint pursuant to the Doctrine of Laches and pursuant to the Federal Longshoreman's and Harbor Workers Compensation Act, 33 U.S.C.A. §933(b).

JOHN F. McHUGH, Esq.
General Counsel
c/o Prudential Lines, Inc.
One World Trade Center
Suite 3701
New York, New York 10048

Sworn before me
this 14th day of January 1981

.....

Notary Public

Defendant's Renewed Notice of Motion to Dismiss Complaint (filed May 8, 1981)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

80 Civ. 2349 (LBS)

ANGELO DEL RE,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.,

Defendant.

Sirs:

PLEASE TAKE NOTICE that upon the annexed affidavit of John M. McHugh, and the exhibits attached hereto (A, B, C, D, and E) and the memorandum of law in support thereof, and upon all prior pleadings and proceedings, the undersigned will move this Court at a motion part thereof to be held at the Courthouse, Foley Square, on May 21, 1981, at 2:15 in afternoon of that day for an order dismissing this action on the ground that plaintiff fails to state a cause of action upon which relief can be granted under FRCP 12(b)(6) since he has lost his right of action pursuant to 33 U.S.C. 933(b), with costs, and for such other and further relief as to the Court may seem just and proper.

Please take further notice that you are required to serve your answering papers, if any, 3 days prior to the return date of this motion.

Defendant's Renewed Notice of Motion to Dismiss Complaint

Dated: New York, New York
May 7, 1981

JOHN F. McHUGH
General Counsel
Prudential Lines, Inc.
One World Trade Center
Suite 3701
New York, NY 10048
(212) 775-0550

To:

ZIMMERMAN & ZIMMERMAN
Attorney for Plaintiff
160 Broadway
New York, NY 10038

Affidavit of John F. McHugh filed December 16, 1980, in Support of Defendant's Renewed Motion to Dismiss Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

80 Civ. 2349 (LBS)

ANGELO DEL RE,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.,

Defendant.

JOHN F. McHUGH, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice before this court and the Secretary and General Counsel for the defendant, and as such am familiar with the facts pertaining to this motion as the result of having reviewed the records of this company with regard to this action. I am the attorney of record for the defendant in this action.

2. I make this affidavit in support of a motion by the defendant dismissing this action on the ground that plaintiff fails to state a cause of action upon which relief may be granted as against the defendant and that he has lost his right of action pursuant to the provisions of 33 U.S.C. 933(b).

4. A motion to dismiss this action based on laches and 33 U.S.C. 933(b) was previously filed with this Court by the defendant on December 16, 1980.

Affidavit of John F. McHugh in Support of Defendant's Renewed Motion to Dismiss Complaint

5. At that time, defendant was not yet in receipt of plaintiff's compensation records, and could only allege upon information and belief that plaintiff filed his action more than six months after he received his final award of compensation.

6. On January 30, 1981, defendant's motion was denied without prejudice to renew it, on the ground that "the strongest allegation defendant can make . . . is that 'there is strong indication that this action' was not timely filed." (See Exhibit A hereto, pg. 4).

7. In the intervening period of time between the denial of defendant's previous motion and the instant motion, defendant has obtained plaintiff's compensation records and a copy of his final compensation award from the U.S. Department of Labor.

8. Defendant now renews its motion to dismiss plaintiff's complaint on the ground that he is an improper party to pursue this action pursuant to 33 U.S.C. 933(b) since he brought his action more than six months after receiving his final award of compensation.

9. This action was brought for injuries allegedly sustained by the plaintiff while performing stevedoring work aboard defendant's vessel the S. S. Santa Barbara on or about March 7, 1975.

10. The instant action was commenced by the filing of a summons and complaint on April 28, 1980. (Exhibit B hereto).

11. A state court action alleging the same set of facts was commenced by the service of a summons upon defendant on October 17, 1977. (Exhibit C hereto).

Affidavit of John F. McHugh in Support of Defendant's Renewed Motion to Dismiss Complaint

12. Plaintiff's State Supreme Court action was voluntarily dismissed by the plaintiff, with prejudice, a copy of which was filed in State Supreme Court, New York County, on March 4, 1980. (Exhibit D hereto).

13. Plaintiff is not a proper party to pursue this action as the plaintiff is an employee of a stevedoring company and is not seeking recovery from the owners of the vessel on which he was allegedly injured. Plaintiff's failure to bring this action against the vessel owner within six months after the compensation award resulted in a statutory assignment to his employer of his exclusive right to proceed against the vessel owner pursuant to section 933(b) of the Longshoremen's & Harbor Worker's Compensation Act, 33 U.S.C. 901 *et seq.*

14. Plaintiff received his final award of compensation on February 25, 1977. (Exhibit E hereto). This action was brought more than two years and eight months after that award. Plaintiff is therefore, statutorily barred from bringing this action.

15. Plaintiff may argue that his action was commenced by the service of a State Court Summons on defendant on October 17, 1977.

16. However, plaintiff's action would still be barred under 933(b) since the summons was served eight months after plaintiff received his final award of compensation.

WHEREFORE, your deponent respectfully requests that this motion be granted dismissing plaintiff's complaint on the ground that he fails to state a cause of action upon which relief may be granted, and on the ground that the

plaintiff is not the proper party to pursue this action pursuant to 33 U.S.C. 933(b).

JOHN F. McHUGH
General Counsel
Prudential Lines, Inc.
One World Trade Center
Suite 3701
New York, NY 10048
(212) 775-0550

Sworn to before me this
day of May, 1981

.....

Notary Public

Affirmation of Howard Fishkin, on Behalf of Plaintiff, filed May 19, 1981, in Opposition to Defendant's Renewed Motion to Dismiss Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

80 Civ. 2349
Judge Sand

ANGELO DEL RE,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.,

Defendant.

HOWARD FISHKIN, an attorney duly admitted to practice before this Court, and an associate of Zimmerman & Zimmerman, attorneys for plaintiff, hereby affirms the following statements upon information and belief:

1. The State Court action was discontinued pursuant to your Honor's order dated January 30, 1981. The discontinuance does not state "with prejudice". The discontinuance of the State Court action should not in any manner prejudice the instant action pending before your Honor.

2. The State Insurance Fund which was the Worker's Compensation Carrier for plaintiff's employer at the time of this accident "has ratified" this pending action. The State Insurance Fund will not commence its own action arising out of this accident as long as the plaintiff's action is permitted to continue. The State Insurance Fund agrees

Affirmation of Howard Fishkin, on Behalf of Plaintiff, in Opposition to Defendant's Renewed Motion to Dismiss Complaint

to be bound by the results of this action insofar as it determines the "fault" or lack of it with regard to the happening of the accident (annexed is the letter from the State Insurance Fund to that effect marked Plaintiff's Exhibit 1).

It is evident based on the copies of the decisions annexed to Plaintiff's Memorandum of Law that the State Insurance Fund ratification and agreement not to commence its own lawsuit prevents a duplication of the lawsuit herein (by different parties). Defendant, therefore, is not subject to a multiplicity of lawsuits by the plaintiff and the compensation carrier.

WHEREFORE, affiant requests that the instant motion be denied in each and every respect.

/s/ HOWARD FISHKIN
Howard Fishkin

Dated: New York, New York

May 18, 1981

Letter From State Insurance Fund (the Workmen's Compensation Carrier for Plaintiff's Employer), dated May 12, 1981, to Zimmerman & Zimmerman, Attorneys for Plaintiff, Ratifying Commencement and Continuance of Plaintiff's Action Against Defendant

THE STATE INSURANCE FUND
199 Church Street
New York, N. Y. 10007

May 12, 1981

Zimmerman & Zimmerman
160 Broadway
New York, N.Y. 10038

Attention: Irving Kernis, Esq.

Re: Acc. #9 461 233-45
Your File #2-39033
Angelo Del Re v.
Prudential Lines, Inc.

Dear Sir:

We were the Longshoremen's Act Insurer of Northeast Stevedoring Co., Inc. the employer of plaintiff claimant on March 7, 1975, the date he was injured while working aboard a Prudential vessel.

We hereby ratify plaintiff-claimant's commencement and continuance of his action against Prudential Lines, Inc. to recover damages for the personal injuries he sustained as a consequence of the accident.

If our ratification is sufficient to preserve to plaintiff-claimant ownership of the cause of action, we shall, of course, not institute a separate action against Prudential

Letter From State Insurance Fund (the Workmen's Compensation Carrier for Plaintiff's Employer)

Lines, and we will be bound by any judgment which may be rendered in said action insofar as it determines liability, or lack thereof, for the accident, and the damages recoverable, if any. We understand also that we would be bound by any release executed by the plaintiff-claimant with our approval. Our lien and credit rights are, however, to attach to the proceeds of any recovery by way of judgment or settlement and are not in any way hereby released or relinquished.

Very truly yours,

/s/ Raymond C. Green
Raymond C. Green
Supervising Attorney

State Court Summons

SUPREME COURT
OF THE STATE OF NEW YORK

County of New York

Angelo Del Re,

Plaintiff,

—against—

Prudential Lines, Inc.,

Defendant.

Plaintiff designates New York County as the place of trial.

The basis of the venue is Defendant's address.

Plaintiff resides at 95 First Place, Brooklyn, New York.

To the above named Defendant

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorneys within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded herein.

State Court Summons

Dated, New York, New York
October 14, 1977

Defendant's Address:
One World Trade Center
New York, New York

ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff
160 Broadway
New York, New York 10038
(212) 227-1350

Office - Supreme Court, U.S.
FILED
JUL 19 1982
CLERK

No. 81-2315

In the

Supreme Court of the United States

October Term, 1981

ANGELO DEL RE,

Petitioner,

v.

PRUDENTIAL LINES, Inc.,

Respondent.

Brief in Behalf of Respondent Prudential Lines, Inc., in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

William Sommerstein
Member of the Bar of the Supreme Court of the United States, Counsel of Record for Respondent
One World Trade Center
Suite 8701
New York, NY 10048
(212) 524-9550

Bauman Kamm, P.C.
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New York, NY 10048
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QUESTIONS PRESENTED

1. A longshoreman claims personal injuries during his employment and brings an action in his own name against the third-party shipowner, which action is time-barred by § 33 (b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 933 (b). May his employer, under Rule 17(a), F.R. Civ.P. ratify the commencement of that action in the employee's own name and on his own-behalf after the statutory period of limitations within which the employee might sue has passed and thereby prevent dismissal of the action on the ground that it is time-barred?*

---

* The question is the certified question upon which the appeal below was heard. It was answered in the negative by the Court of Appeals (See Appendix to petition, pages 1a, 2a, 13a).

2. Whether the State Insurance Fund as a claimed statutory assignee of petitioner's cause of action under the longshoremen's and Harbor Workers' Act, as to whom the statute of limitations would bar its own independent action, can validly ratify or re-assign petitioner's otherwise time barred suit against defendant Prudential Lines.

3. Where neither the insurer nor the longshoreman, proceeding alone, could maintain the action may a court by judicially fusing the two expired claims determine that the action was newly resuscitated under F.R.Civ.P.17(b)?

4. Does a New York State statutory prohibition against assignment of personal injury claims (New York General obligations Law §13-101) in any event preclude the stevedore's and its insurance carrier's re-assignment of the claim to petitioner?

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NO. 81-2315

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ANGELO DEL RE,

Petitioner,

v.

PRUDENTIAL LINES, INC.,

Respondent.

BRIEF IN BEHALF OF RESPONDENT PRUDENTIAL LINES, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent Prudential Lines, Inc., opposes petitioner's petition for a writ of certiorari seeking to review the determination of the United States Court of Appeals for the Second Circuit, in the instant case, decided January 21, 1982 (669 F2d 93).

STATEMENT OF THE CASE

Petitioner brought suit against respondent Prudential Lines, Inc., to recover damages for personal injuries which he claims to have sustained on March 7, 1975, when he was employed by Northeast Stevedoring Company as a longshoreman on Prudential's vessel the SS Santa Barbara then docked at Brooklyn.

Petitioner commenced the instant action by the filing of a summons and complaint on April 28, 1980, more than five years after the alleged accident and more than three years and two months after the final U.S. Department of Labor order awarding petitioner compensation.

A previous New York State Supreme Court action for the same cause of action was commenced by service of a bare summons, without complaint, upon respondent on October 17, 1977. Respondent never

appeared in the state court action and petitioner failed to take any steps to prosecute his action. On March 4, 1981, petitioner voluntarily discontinued his State Supreme Court action.

In its answer to the instant complaint which was served on petitioner on June 4, 1980, respondent raised the defense of laches and the further defense based upon the petitioner's failure to state a cause of action upon which relief can be granted (F.R.Civ.P.12(b)(6) since he had lost his right of action pursuant to 33 U.S.C. 933(b) in failing to commence it within six months following the termination of compensation.

Thereafter, respondent moved to dismiss the complaint on the grounds of laches and on the ground of petitioner's failure to state a cause of action upon which relief could be granted pursuant to 33 U.S.

C. 933(b).

The District Court, in its opinion dated January 30, 1981, denied the motion to dismiss the complaint as to the defense of laches but without prejudice to renewal at the close of trial. The motion to dismiss on the grounds of the failure to bring this action within six months of the termination of compensation payments was also denied without prejudice to renewal since respondent was unable at that time to produce petitioner's compensation records.

Respondent then renewed its motion to dismiss on the grounds of petitioner's failure to bring this action within six months of termination of compensation payments, when it had received the compensation records which indicated that considerably more than six months elapsed between the date of the final compensation

award to petitioner and the commencement of his action.

Petitioner did not dispute the fact that he commenced suit more than six months after his scheduled award was finalized by the United States Department of Labor Deputy Commissioner. In an effort, however, to prevent dismissal of this action petitioner procured a letter dated May 12, 1981, from the State Insurance Fund purporting to assert that it "ratified" petitioner's unilateral commencement of this suit.

Petitioner's attorney's affidavit in opposition to the motion only claimed that the motion to dismiss should not be granted because the State Insurance Fund, the insurance carrier for petitioner's employer, "ratified" his suit, e.g., reassigned the cause of action to petitioner.

The District Court in its opinion dated

June 18, 1981, denied respondent's motion stating:

> "The insurer cannot institute an action in its own name because the statute of limitations bars such a proceeding; the longshoreman cannot maintain an action in his own name because more than six months have elapsed since receipt of the compensation award; although neither the insurer nor the longshoreman, proceeding alone, can maintain the action, the consequence of the longshoreman having brought an action within the period of the statute of limitations in conjunction with the ratification by the insurer, permits the action to be resuscitated under F.R.Civ.P.17(a)."

The District Court specifically found that petitioner's action could not be maintained in his own name because more than six months had elapsed since receipt of the compensation award and that the insurer's action could not have been instituted any more because the expired statute of limitations had barred such a proceeding. Nevertheless it denied the motion on the ground that by fusing the two expired causes of action into one the

petitioner's action could be resuscitated by fashioning an entirely new set of remedies to deal with an aspect of the problem that Congress expressly addressed, and by providing a new procedural device to avoid or undo the assignment of a longshoreman's cause of action.

On July 7, 1981, the District Court amended its opinion and order of June 18, 1981, certifying the question for appeal to enable immediate interlocutory review pursuant to 28 U.S.C.§1291(b).

The Court of Appeals granted petitioner's motion for leave to appeal under its order dated August 11, 1981.

POINT ONE

STATE INSURANCE FUND'S REMEDY AGAINST RESPONDENT IS EXCLUSIVE AND CANNOT BE RE-ASSIGNED TO PETITIONER.

The primary issue before this Court is whether the State Insurance Fund, as a claimed statutory assignee of petitioner's personal injury claim under the Longshoremen's and Harbor Workers' Act, 33 U.S.C. 933(b) (hereinafter referred to a LHWCA), can re-assign the cause of action to petitioner notwithstanding the fact that petitioner's cause of action is time-barred and he no longer has a cause of action against Prudential. This Court in Rodriguez v. Compass Shipping Co., Ltd., 41 CCH S.Ct. Bult. 2478, U.S., 49 U.S. Law Week 4527 (May 18, 1981), proscribes the purported ratification or re-assignment herein. To permit State Insurance Fund's ratification or re-assignment to be effi-

cacious is to read §933(b) out of the Act. Congress certainly did not intend such a debilitating result.

This Court concluded in Rodriguez that the LHWCA limitation period and assignment provisions are rendered meaningless if a longshoreman can bring suit against a shipowner after the limitation period for his suit expires. The Court stated in this regard at 49 Law Week 4529:

> "The statutory assignment encompasses 'all right' of the employee to recover damages from a third party. These words preclude the possibility that the assignment is only a partial one that does not entirely divest the employee of his right to sue, or that the employee and the employer possess concurrent rights to sue in the post-assignment." (Emphasis supplied.)

Consequently, the Court impliedly, if not explicitly, proscribed suits such as the one at bar.

This Court's Rodriguez decision broadly stands for the proposition that a longshoreman may not pursue a claim for

damages against a shipowner unless he brings the action within six months following his acceptance of a final award of compensation. More specifically however, Rodriguez must be read to prohibit an employer's ratification or re-assignment of its §933(b) claim since such an act creates a new remedy which Congress did not provide for in the LHWCA. The Supreme Court stated at 49 Law Week 4532; 68 L.Ed.2d 485,486:

> "We are persuaded that Congress did indeed intend to require the employee either to act promptly or to accept the consequences of an assignment of his claim to the employer. One of the consequences ...is the risk that the employer will choose not to sue. The comprehensive character of the procedures outlined in the act precludes the fashioning of an entirely new set of remedies to deal with an aspect of a problem that Congress expressly addressed." (Emphasis supplied.)

There is no doubt that Rodriguez denies longshoremen the right to prosecute their causes of action once the six-month period

has elapsed. Rodriguez construed §933(b) as a comprehensive set of statutory procedures which precludes the fashioning of substitute remedies. At bar the insurance carrier chose not to sue and allowed the statue of limitations to run out. It can not now "ratify" a cause of action that has already expired.

The U. S. Supreme Court specifically noted that Congress intended to require a longshoreman to act promptly within the six-month limitation period or be forever barred from suing a third party (Rodriguez, supra, at 4530). It is apparent, therefore, that the District Court's view that the six-month limitation period may be avoided by re-assignment of the cause of action to the longshoreman ignores the Supreme Court's construction of the statutory language of §933(b).

It should be noted that the Supreme

Court held at 49 Law Week 4532:

> "The fact that parties sometimes fail to assert meritorious claims within the period authorized by law is not a sufficient reason for refusing to enforce an unequivocal statutory bar."

After discussing the clear import of the statutory language of §933(b), Rodriguez examined the legislative history behind the LHWCA. It noted that the six-month time bar "***set forth in §933(b) protects the interests of both the employees and the employers, and is consistent with the general policy of the Act to encourage prompt and efficient administration of compensation claims." Rodriguez, at 4531, supra. (Emphasis supplied.)

The Court also examined the 1972 Amendments to the LHWCA and pointed out that Congress purposefully balanced by statute the conflicting interests of vessel owner, stevedore and longshoreman. The compre-

hensive scheme enacted by Congress to balance and protect the competing interests of the parties involved required the Court in Rodriguez to deny a demand that the Court fashion a new remedy which was not created by the LHWCA. The Court stated at page 4532:

> "As with other problems interpreting the intent of Congress in fashioning various details of this legislative compromise the wisest course is to adhere closely to what Congress has written. The meaning of §933(b) is plain and should be respected."

Ratification should be no more successful as a procedural device to evade the requirements of the statute than assignment. Further, an invalid action cannot be made valid by ratification. In the case at bar petitioner's instant suit has been invalid as time-barred long before the day it was filed. The insurer's cause of action was also time-barred as six years have passed since the alleged

injury, twice the statutory period. The petitioner cannot by belated self-help reacquire a cause of action long ago assigned away by operation of statute; nor can the insurer revive its own expired claim by the semantic exercise of conjoining these two expired claims into a suddenly timely one. It was not the intent of Congress to allow reimcarnation of time-barred claims. This conclusion is mandated by the unanimous ruling of the U.S. Supreme Court in Rodriguez v. Compass Shipping Co., Ltd., supra.

Subsequent to the Rodriguez decision, the U.S. District Court for the Eastern District of Virginia (Norfolk Division) held in Bandy v. Bank Line Ltd., No. 77-7160, E.D. Va., July 7, 1981, that:

> "The language of the Act (LHWCA) is plain and unequivocal and does not provide for either the substantive right to receive such an assignment or for the procedure used by the

> plaintiff. To hold otherwise would constitute an end run around and make a mockery of the clear Congressional mandate that a longshoreman file his suit within six months of the receipt of an award." (Emphasis supplied.)

Bandy involved a similar "assignment" as in the case at bar. We believe the language of Bandy on that point deserves repetition here:

> "The Act and its legislative history, as interpreted by the Rodriguez Court, clearly forbid such a pro forma procedure for reinstating a longshoreman's right to sue a third party once he has lost such a right because of his failure to file suit within the six-month limit established by the Act."

Bandy provides an illuminating insight into the tactical advantages obtainable if such a re-assignment by the insurance carrier to the longshoreman may be used to evade the clear mandate of §933(b). The learned Court there noted:

> "Absent a conflict of interest, an employer or compensation carrier who had failed to pursue the cause of action, either because it had been

> dilatory or because it believed that the action was so weak that it did not wish to risk the cost of litigation, certainly would assign that right to the employee in the hope that the employee would initiate the action. If for example, the employee brought suit seeking a nuisance settlement, to harass the third-party tortfeasor, or even in the mistaken belief that he had a valid claim, the employer or its compensation carrier, by virtue of its statutory lien, would be the beneficiary, without risk, of any unexpected recovery.
>
> "Accordingly, an employer or compensation carrier would be foolish not to expend the insignificant effort required to execute an assignment of the right of action upon a request by the longshoreman in every case that it had decided not to pursue and in which no conflict of interest existed."

The language of the statute is clear. A longshoreman may accept compensation benefits and still bring a third-party action provided he does so within the six (6) month period set forth in §933(b). Failure to do so operates as an assignment to his employer of "all right" to bring the third-party action. Congress evidently chose not to go further. It made no

provision for restoration of the cause of action to the longshoreman either by way of ratification or assignment or reassignment or other procedural mechanism. Certainly Congress did not intend to allow extensions of the six-month period such that a third-party cause of action could thereby be shuttled about without end.

If petitioner's argument were to prevail it would result in authorizing a time-barred petitioner to join forces with a time-barred assignee to bring an action by petitioner and revitalize it by "ratification" seeking to resuscitate it like the legendary phoenix which rose alive from its own ashes. In effect, such a result will unfairly allow State Insurance Fund to avoid the consequences of its own default by ratifying petitioner's default.

The Court of Appeals, in its carefully considered opinion below, correctly and

succinctly concluded with the following (Appendix to petition, p. 13a):

> "We adhere to the principle of Rodriguez, that if a longshoreman fails to bring suit within six months after receiving a compensation award he loses completely his right to sue the shipowner. Thereafter only the employer-stevedore or its subrogated insurer may institute such an action."

POINT TWO

THE STATE INSURANCE FUND'S "RATIFI CATION" IS A PURPORTED ASSIGNMENT OF A SUBSTANTIVE RIGHT WHICH IS INVALID UNDER THE NEW YORK GENERAL OBLIGATIONS LAW.

As noted above, Rodriguez holds that the assignment of a longshoreman's claim to an employer under §933(b) of the LHWCA is a relinquishment of both the longshoreman's substantive right and his remedy against the shipowner. Thus, the State Insurance Fund ratification of petitioner's barred cause of action is really a re-assignment of the State Insurance Fund's cause of action.

Since the State Insurance Fund's re-assignment is a transfer of a personal injury cause of action, the re-assignment is invalidated by the New York General Obligations Law (hereinafter referred to as GOL) affecting transfers of claims. Section 13-

101 of the GOL provides in pertinent part that:

> "Any claim or demand can be transferred except in one of the following cases:
>
> "where it is to recover damages for personal injuries;...."

By virtue of GOL Section 13-101, subdivision 1, "a personal injury claim is not assignable except by specific authority." Unlike the statutory assignment to the employer provided for in Section 933 (b), there is no statutory authority permitting the assignment by the employer or its insurance carrier to the employee. The statutory and substantive law of New York applies in this federal diversity case to the extent that the New York law affects the substantive rights of petitioner and his claim. See, 28 U.S.C. §1652; McCormack v. Bloomfield Steamship Co., 299 F. Supp. 488 (S.D.N.Y.1974); Hazel Bishop

Inc. v. Perfemme, Inc., 314 F.2d 399(2nd Cir. 1963).

The substantive law of New York on the very issue at bar has been passed upon favorably to respondent's view. See, Alongi v. McAllister Lighterage Lines,Inc., 433 N.Y.S. 2d 525; 107 M.2d 122(1980); and Lo Bue v. Prudential Lines, Inc., No. 12508/81 (Sup.Ct., Kings County, decided August 3, 1981).

In Lo Bue v. Prudential Lines, Inc., supra, the trial judge pointed out that the "ratification" procedure is not recognized in New York, stating:

> "The Court observes first that the so-called 'ratification' is really an assignment to the plaintiff of a personal injury claim now belonging to plaintiff's employer's or the employer's insurance company. By virtue of GOL Section 13-101 subdivision one a 'personal injury claim is not assignable except by specific statutory authority' (Juba v. General Bldgs. Supply Corp. [N.Y. 2d 53]). Unlike the statutory assignment to the employer provided for in Section 933(b), there is no statutory authority permit-

ting the assignment by the employer or its insurance carrier to the employee. The insurance company's is therefore precluded from assigning its cause of action to the employee (Alongi v. McAllister Lighterage Line, Inc. [107 Misc. 2d 122])."

POINT THREE

THE PETITIONER IS NOT THE REAL PARTY IN INTEREST.

The true meaning of "real party in interest" under Rule 17 of the Federal Rules of Civil Procedure is summarized as follows:

> "An action shall be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced." 3A J. Moore, Federal Practice §17.07 (2d Ed.,1979).

The purpose of Rule 17 is to require the action to be prosecuted by the person who possesses the right to enforce the underlying claim and who has a significant interest in the litigation according to the substantive law. Virginia Electric & Power Co. v. Westinghouse Electric Corp., 485 F. 2d 78 (4th Cir.1973). If the state substantive law dictates that a person has an enforceable right, he is the real party in interest for the purposes of

District Court diversity action. 3A J. Moore, supra, at 17-74; Dubuque Stone Products v. Fred L.Gray Co., 356 F.2d 718 (8th Cir.1966).

It is admittedly true that, if the State Insurance Fund and Northeast Stevedoring Company are the plaintiffs, the present plaintiff would have an interest in any recovery which they might obtain from Prudential under the provisions of §933(b). However, it is also true that the nature of the present plaintiff's interest in an action brought by State Insurance Fund and Northeast Stevedoring Company would be a mere expectancy. A longshoreman has no right to demand that his employer or its compensation carrier prosecute his case. See,Rodriguez, supra. Having no right to sue or to compel suit, the longshoreman cannot be said to be the real party in interest after his claim has

been assigned. This Circuit has initially ruled in Rodriguez, 617 F.2d 955(2nd Cir. 1980), that upon assignment by operation of the LHWCA, the longshoreman's employer becomes the real party in interest. See also, United Federation of Postal Clerks v. Watson, 409 F.2d 962 (D.C.Cir. 1969).

It should be noted that the re-assignment herein may also lead to multiplicity of suits. The State Insurance Fund by its so-called ratification waived all rights against Prudential. However, Northeast Stevedoring Company has not waived its rights against Prudential, and has not ratified petitioner's suit, thus leaving Prudential still potentially subject to suit by Northeast Stevedoring Company albeit somewhat protected by the expired statute of limitations.

Since state and federal law hold that the State Insurance Fund and North-

east Stevedoring Company possess the exclusive right to proceed against Prudential and, since they are the real parties in interest, the action can only be prosecuted by them.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
July, 1982

Respectfully Submitted,

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Attorney of Record
for Respondent

BERNARD KLIEGER,
Of Counsel

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 81-2315

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANGELO DEL RE,

Petitioner,

v.

PRUDENTIAL LINES, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

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CONCLUSION:

For the foregoing reasons, as well as those set forth in the petition for writ of certiorari, the petition for said writ should be granted. 6-7

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No. 81-2315

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ANGELO DEL RE,

Petitioner,

v.

PRUDENTIAL LINES, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

I

WITHOUT MERIT IS RESPONDENT'S CONTENTION THAT THE STATE INSURANCE FUND'S REASSIGNMENT TO PETITIONER OF THE LATTER'S CAUSE OF ACTION FOR PERSONAL INJURY DAMAGES IS WITHOUT FORCE OR EFFECT, BECAUSE, RESPONDENT CONTENDS, THE REASSIGNMENT IS PROHIBITED BY NEW YORK STATE LAW

In its brief (p. 19, last six lines - pp. 22), respondent contends that the State Insurance Fund's reassignment to petitioner of the latter's cause of action for personal injury damages, which had previously been assigned to the Fund when petitioner failed to bring suit on the cause of action within the time prescribed by law for doing so, is without force or effect because, respondent contends, the reassignment is interdicted by New York State statute. The statute respondent relies upon is the General Obligations Law, section 13-101, quoted in respondent's brief, at p. 20, which states, insofar as pertinent, that

"Any claim or demand can be transferred except in one of the following cases: Where it is to recover damages for personal injuries,..."

Respondent's contention, we submit, is, for the reasons which follow, without merit.

First,

"..... the main purposes of the general rule of non-assignability of claims for personal injury are not offended by this type reassignment (that is, reassignment back to the injured party). Those purposes, to prevent unscrupulous strangers to an occurrence from preying on the deprived circumstances of an injured person, and to prohibit champerty, simply have no applicability where the assignment is to the injured person himself."

> Caldwell v. Ogden Sea Transport (4 Cir., 1980), 618 F. 2d 1037, 1048 (at "13"; left hd. col.; matter in parentheses supplied).

In Hroncich v. Sun Export Holding Corp., not reported; (New York Supreme Court; New York County, Index #10877/81;

Greenfield, J.; June 23, 1982), reproduced in the Appendix Of Unreported Decisions attached to this brief, beginning at p. A 10 , infra, the court, citing Caldwell v. Ogden Sea Transport Inc. (4 Cir., 1980), supra, 618 F. 2d at p. 1047, stated as follows in reference to a reassignment back to the injured party, alluding to it as an "assignment":

> "Such an assignment does not violate the rule forbidding the assignment of personal injury claims (see G.O.L., section 13-101(1)), since the assignment revests in the LHWCA claimant the exclusive right to maintain action on the third-party claim in protection of his own and the employers (sic) beneficial interest. (See Caldwell v. Ogden Sea Transport, Inc., 618 F. 2d at 1047)" (penultimate par., A 14-A 15, infra).

Secondly,

> ".... No violence (is) done to the underlying statutory scheme by such a development (as) 'reassignment'".
>
> Caldwell v. Ogden Sea Transport, Inc., supra (4 Cir., 1980), 618 F. 2d, at p. 1047; matter in parentheses supplied), to be read with 1047-1048.

See, also, De Luzio Transamerican Trailer Transport, Inc., a/k/a Transamerican Trailer Ferry, Inc., not reported; (New York Supreme Court, New York County, Index # 12339/80; March 23, 1981); reproduced in the Appendix to this brief, beginning at p. A 2, infra; see, especially, penultimate par., and also generally; and see, also, Susino v. Akrion Shipping Co., S.A.; not reported; (New York Supreme Court, New York County, Index #13029/80; July 21, 1980; Wallach, Richard W., J.); reproduced in the Appendix to this brief, beginning at p. A 19, infra; also, Marullo v. Reederei Richard Schroeder, K.G. (D.C.S.D.N.Y., July 30, 1980), not reported; reproduced in the Appendix to this brief, beginning at p. A 16, infra.

Third,

> "..... the statutory scheme itself involves an initial assignment of the exclusive right to maintain the action, bespeaking a Congres-

sional rejection of any general common law rule against assignability of third person claims under LHWCA."

> Caldwell v. Ogden Sea Transport, Inc., supra (4 Cir. 1980), 618 F. 2d, at p. 1048 (at "13"; left hd. col.).

See, also, S. 1182 (97th Congress; 1st Session; Staff, Draft No. 3), proposed amendment to section 33(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., section 933(b), providing that

> ".... If the employer fails to commence an action against such third person within a reasonable time after the cause of action is assigned under this section, the right to bring such action shall reassign (sic, probably should be 'shall be reassigned' or 'shall be deemed to have been reassigned') to the person entitled to compensation."

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for writ of

certiorari, the petition for said writ should be granted.

Respectfully submitted,

IRVING B. BUSHLOW
Counsel of Record
for Petitioner

A 1

APPENDIX OF UNREPORTED DECISIONS

APPENDIX OF UNREPORTED DECISIONS

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I
- - - - - - - - - - - - - - - - - - - -X

ONIELLO DE LUZIO,

Plaintiff,

-against-

Index No.
12339/80

TRANSAMERICAN TRAILER TRANSPORT, INC., a/k/a TRANSAMERICAN TRAILER FERRY, INC.,

Defendant.

- - - - - - - - - - - - - - - - - - - -X

ALTMAN, Myriam J., J:

In this personal injury action, defendant moves for summary judgment dismissing the complaint on the ground that it is time-barred (US Code, tit 33, sec. 933, subd(b)). Plaintiff is a longshoreman who, while in the employ of the John W. McGrath Corporation (McGrath), performed stevedoring work on a vessel chartered by defendant. In the course of his employment, plaintiff sustained knee and back injuries and subsequently claimed

compensation from his employer pursuant to the Longshoremen's and Harbor Workers' Compensation Act (US Code, tit 33, sec 901 et seq.). On November 22, 1974, plaintiff was awarded disability benefits pursuant to a compensation order signed by the Deputy Commissioner of the 2nd Compensation District. Some seventeen months later, on April 15, 1976, plaintiff served a summons with notice upon defendant. The complaint, alleging negligence on the part of defendant, was apparently served pursuant to demand on or about September 13, 1979.

Section 933 of title 33 of the United States Code governs the maintenance of third-party actions by a person in plaintiff's position. Subdivision b of that section provides as follows:

Acceptance of such compensation under

> an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

Defendant claims that plaintiff's failure to commence this action within six months after the date of the compensation order resulted in an assignment of his cause of action to McGrath. For this reason defendant seeks summary judgment.

While the right to sue generally vests in the employer upon an employee's failure to bring suit within the requisite statutory time period, the assignment is not absolute and may be nullified (Rodriguez v Compass Shipping Co. Ltd., 617 F2d 955, cert gr 101 S Ct 69). There is a split in the Federal Circuit

APPENDIX OF UNREPORTED DECISIONS

Courts of Appeal concerning the circumstances under which such an assignment is nullified and the right to bring suit is revested in the employee. The Fourth Circuit has liberally interpreted section 933 (subd (b)) holding that the "right of action may be revested in the longshoreman when it becomes manifest that the assignee, with knowledge of its exclusive right to control and prosecute the claim nevertheless declines to do so for any reason" (Caldwell v Ogden Sea Transport, 618 F2d 1037, 1046).

The Second Circuit, on the other hand, has strictly applied the six-month time bar (Rodriguez v Compass Shipping Co. Ltd., 617 F2d 955, cert gr 101 S Ct 69, supra). However, while restricting the circumstances under which the right of action may revest in the employee,

the court did suggest that ratification of the action by the employer may permit the maintenance of a suit by the employee. The court found that upon expiration of the six-month time period the employer possessed the exclusive right to sue, but noted additionally that the employer "(had) not joined in the action or ratified its commencement even though it (had) had a reasonable time to do so" (Rodriguez v Compass Shipping Co. Ltd., supra, p. 958).

In a subsequent decision rendered by the United States District Court for the Southern District of New York, the court found that the compensation carrier had ratified or assigned the interest in the claim back to the plaintiff longshoreman and that his suit was not barred (Marullo v Reederei Richard Schroeder, K.G., US Dist Ct, SDNY, July 30, 1080, GOETTEL, J.). The court relied upon Rule 17

(subd (a)) of the Federal Rules of Civil Procedure which provides that "(n)o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by *** the real party in interest". In that case, a letter from the compensation carrier, wherein the carrier agreed to be bound by the results of the plaintiff's action and to waive its right to bring an action, was found sufficient to transfer the cause of action back to the plaintiff. The court rejected the defendant's claim that ratification had not occurred within a reasonable time. It found that, pursuant to Rule 17 (subd (a)), the "objection" was made when the defendant filed the motion to dismiss and that the ratification was ob-

tained within a reasonable time after this objection.

There appears to be no counterpart to the particular ratification provision of Rule 17 (subd (a)) in New York procedural law. However, the principle underlying Rule 17 (subd (a)) - the protection of a defendant against multiple actions - is equally applicable in state court. Therefore, the application of the reasoning of these recent Federal decisions to the instant case is warranted.

Plaintiff has submitted a letter from McGrath dated July 31, 1980 in which McGrath ratifies the action brought by plaintiff, agrees to be bound by its results and waives its right to bring its own action.

The six-month limitation contained in the Federal statute is not a statute of limita-

tions. It acts to accomplish an assignment of the claim to the longshoreman's employer, who may then bring suit on behalf of himself and the longshoreman. Although pursuant to the assignment, the action is brought by the employer, the longshoreman maintains an interest in the recovery (US Code, tit 33, sec. 933, subd (e), par (2)). Here there has been an actual assignment of that action back to the longshoreman. Such assignment has not imposed additional burdens upon the defendant as the substantive issues confronted by it are the same whether the party in interest as plaintiff is the injured longshoreman or his employer.

I find that plaintiff is the true party in interest and, accordingly, defendant's motion is denied.

DATED March 23, 1981 /s/ M.J.A.
J.S.C.

APPENDIX OF UNREPORTED DECISIONS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: SPECIAL TERM, PART I

- -X

NIKOLA HRONCICH,

Plaintiff,

Index No. 10877/81

-against-

SUN EXPORT HOLDING CORP., et al.,

Defendants.

- -X

Greenfield, J.:

Defendant shipowner, Sun Export, moves and co-defendant, Weeks Crane, cross-moves to dismiss the action brought against them by a longshoreman on the ground that the action was not commenced within six months after plaintiff settled a compensation claim filed by him against his employer pursuant to the 'Longshoreman's and Harbor Workers Compensation Act (LHWCA)(33 USC sec 901 et seq)'.

APPENDIX OF UNREPORTED DECISIONS

Defendants contend that under LHWCA sec 933 (33 USC sec 933(b) and (h)), a longshoreman's right to recover damages against a shipowner is assigned to his employer, or to his employer's insurer in subrogation, if an action against the shipowner is not commenced by the longshoreman within six months after accepting compensation under an award in a compensation order.

In opposition, plaintiff asserts that the employer ratified the plaintiff's commencement of the action in his own name, waived any right to bring an action and agreed to be bound by the result. Plaintiff, therefore, contends that his suit is viable and should not be dismissed.

In Rodriquez v. Compass Shipping Co. (451 US 596) relied upon by defendants, the

court held that once there is an acceptance of compensation pursuant to an award in a compensation order and the passage of the six month period, the statutory assignment is triggered. "When the sec 33(b) (33 USC sec 933(b)) assignment occurs, it transfers the employee's entire right to commence a third-party action to the employer" (451 U.S. at 603).

The court noted that the 1959 amendments to the LHWCA did nothing to preserve the employee's right to commence a third-party suit after expiration of the six month period (but see Czaplicki v. The Hoegh Silvercloud, 351 US 525), and stated that "although the amendments encourage employers to pursue assigned claims, they do not qualify the assignee's control of the cause of action after the assignment takes place. *** (T)he legislative history indicates that once the 6-month period expires, the em-

ployer possesses complete control of the third-party claims" (Rodriquez v. Compass Shipping Co., 451 U.S. at 611-612).

The complete power of control exercisable by the employer includes the power to reassign the case back to the injured employer. (Caldwell v. Ogden Sea Transport, Inc., 618 F. 2d 1037 (4th Cir., 1980)).

In Caldwell, the court, using its equitable powers fashioned a mechanism whereby an employee could proceed to compel a formal reassignment of the right of action in those circumstances where it becomes manifest that the assignee, with knowledge of its exclusive right to control and prosecute the claim, nevertheless declines to do so for any reason.

In its Rodriquez opinion (451 U.S. at 612-614), the court criticized the Caldwell

* "employer", manifestly, should be "employee".

court finding that the mechanism created by the Fourth Circuit was unsupported by any evidence that Congress created either the substantive right itself or the procedural rights set forth in the opinion.

However, in this case there has been no compulsion; no mechanism was employed to force the assignee to reassign. It is clear that under Rodriquez the employer, as statutory assignee, is free to institute suit or refuse to institute suit as it sees fit. It is also free to reassign or ratify an action brought by its employee. (See Miller v. Wells Fargo Bank International Corp., 540 F 2d 548 (2nd Cir., 1976)).

Such an assignment does not violate the rule forbidding the assignment of personal injury claims (See G.O.L. sec 13-101(1)) since

the reassignment revests in the LHWCA claimant the exclusive right to maintain action on the third party claim in protection of his own and the employers beneficial interest (See Caldwell v. Ogden Sea Transport, Inc., 618 F. 2d at 1047).

Accordingly, the motion is denied.

Dated: June 22 1982

E.J.G.
J.S.C.

APPENDIX OF UNREPORTED DECISIONS

E N D O R S E M E N T

GIOVANNI MARULLO V. REEDEREI RICHARD SCHROEDER, K.G., 79 Civ. 3757 (GLG)

Defendant moves to dismiss plaintiff's complaint because, since the action was not brought within six months of the date of the settlement of the compensation claim, the cause of action belonged to the compensation carrier pursuant to Title 33 U.S.C. sec. 933(b). In response to the motion the plaintiff has submitted a letter from the claims manager of the compensation carrier, Zurich Insurance Company. In it he states that pursuant to Rule 17(a) of the Fed. R. Civ. P. the company ratified the action of the plaintiff in suing the defendant. Moreover, the company's carrier stated:

> "We agree to be bound by the results of the plaintiffs (sic)

> action and will not bring an action for the release (sic) requested, and we will waive our right to bring an action in our name as the real party in interest herein."

Defendant argues that the letter is inadequate to correct the fact that the plaintiff lacks standing to bring the action, since he is not the real party in interest, and that even if the letter were a sufficient ratification pursuant to Rule 17(a), the ratification did not occur within "a reasonable time" as provided by the rule.

Merely sending a letter stating that the insurer "ratifies" the longshoreman's action would probably be insufficient to satisfy 33 U.S.C. Sec. 933(b) as interpreted by the Second Circuit decision in Rodriquez v. Compass Shipping Company Ltd., 617 F. 2d 955 (2d Cir. 1980). However, the letter from the insurance carrier, while

not artfully worded, amounts to an assignment of its interest in the claim. Under these circumstances, the plaintiff has again become the real party in interest and the requirements of Rule 17(a) have been met.

With respect to the claim that the ratification did not occur within a reasonable time since the accident occurred three years ago, it is not the date of the accident which initiates the need for ratification. Pursuant to the rule, the time commences "after objection". The "objection" was not made until the defendant filed the instant motion. Consequently, the ratification has occurred within a reasonable time.

The motion is denied.

SO ORDERED:

Dated: New York, New York
July 30, 1980

/s/ Gerard L. Goettel
U.S.D.J.

APPENDIX OF UNREPORTED DECISIONS

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I

- -X

GIUSEPPE SUSINO,

Plaintiff

-against-

Index No. 13029/80

AKRION SHIPPING CO., S.A.,

Defendant

- -X

WALLACH, RICHARD W., J.:

Defendant moves for an order dismissing this action for personal injuries brought by a longshoreman against a shipowner as not having been brought within six months after plaintiff settled a compensation claim filed by him against his employer and accepted the agreed-upon sum. The motion is based upon the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. 933(b) and (h) under which a

longshoreman's right to recover damages against a shipowner is assigned to his employer, or to his employer's insurer in subrogation, if an action against the shipowner is not commenced by the longshoreman within six months after accepting compensation under an award in a compensation order. In opposition to the motion, plaintiff offers a document signed by a representative of his employer's insurer, the authenticity of which is not challenged by defendant, wherein the insurer represents to "ratify" this action and "waive" any right it might have to bring an action in its own name. Whether such effective* to revert the right of action in the longshoreman is an issue which was addressed by the United States Court of Appeals, Fourth Circuit, in the case of Caldwell v. Ogden Sea Transport, Inc., 618 F. 2d 1037, at 1043-1048. Reasoning that the purpose of the Act was to

*Whether "such effective" should probably be "Whether such is effective".

give the right of action over "to that one of the two beneficially interested parties normally best able in terms of resources and experience to prosecute it", the court found that the statutory purpose would not be violated should the statutory assignee renounce his exclusive right of action by either formal* reassigning it to the longshoreman or otherwise indicating a knowledgeable and deliberate relinquishment of his exclusive right to control prosecution of the claim. "The possibilities for establishing liability are not enhanced; the bar of the limitations period to suit on the underlying claim is not affected; and the interest in facing only one action in respect of the two beneficial interests in the claim is unaffected." (supra, at 1047). The court concurs with this reasoning. The cases relied upon by defendant (Rodriguez v. Compass Ship-

*"formal" should probably be "formally".

ping Co. Ltd., 617 F. 2d 955, Smith v. Hansa Deutsch, 76 Civ. 1110, April 14, 1980) do not address the issue of whether a formal reassignment or waiver of the exclusive right of action given the employer or its subrogee under the Act is effective to revest the right of action in the longshoreman. It is significant however, that the court in Rodriquez, in noting that the employer therein had not ratified the action commenced by the longshoreman even though it had had a reasonable time to do so (supra, at 958), implies that such a ratification might be sufficient to overcome a defense grounded on the statutory assignment. Accordingly, the motion is denied.

Dated: September 24, 1980

/s/ R.W.W.
J.S.C.